

OPUS2

LINK FUND SOLUTIONS LIMITED v THE COMPANIES ACT 2006

Day 1AH1

October 10, 2023

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1
2 Tuesday, 10 October 2023
3 (10.30 a.m.)
4
5 DISCUSSION re Housekeeping
6 MRS JUSTICE BACON: Yes, Ms Toube.
7 MS TOUBE: Good morning, my Lady.
8 MRS JUSTICE BACON: Is it a Miss or Ms or something
9 else?
10 MS TOUBE: Ms is fine, thank you.
11 MRS JUSTICE BACON: Ms, great.
12 MS TOUBE: As your Ladyship knows, I appear together
13 with Ms Beltrami for the Scheme company LFSL. Mr Al-Attar,
14 who is my other junior, is unable to attend this morning.
15 Mr Smith KC and Mr Haywood appear for the FCA. Ms Cooke,
16 who is on the far right, appears for the Investor Advocate,
17 who is behind her. Mr Bompas KC and Mr Crossley appear for
18 a set of opposing creditors, as your Ladyship will have
19 seen, represented by Marcus Parker and Leigh Day.
20 MR BOMPAS: Sorry, my Lady, there is a point that comes
21 straight on from that. My learned friend, in her skeleton
22 argument, made an assertion that we are opposing the Scheme.
23 We are not. What we are opposing is the-----
24 MRS JUSTICE BACON: Class composition.
25 MR BOMPAS: Composition of class.

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1 MRS JUSTICE BACON: Yes.
2 MS TOUBE: Your Ladyship should have skeletons from all
3 the counsel in as much as I-----
4 MRS JUSTICE BACON: Can whoever it is who is not muted
5 mute themselves, please? Everybody who is not in the
6 courtroom and is dialling remotely should be muted and with
7 camera turned off. No exceptions, please. All right,
8 sorry. Sorry, Ms Toube. You have run through the list of
9 counsel.
10 MS TOUBE: Yes.
11 MRS JUSTICE BACON: But am I also getting submissions
12 from any of the individual investors, such as Mr Pyatt(?)?
13 MS TOUBE: Yes, so I was going to say that skeleton
14 arguments from counsel should be with you as well as the
15 bundles. There may also be-----
16 UNKNOWN SPEAKER: Going-- a hearing at the moment? If
17 not I will just do-- No, yes, hearing is starting.
18 MRS JUSTICE BACON: I am sorry, everybody who is not in
19 the courtroom and who is dialling in must mute themselves,
20 please. No exceptions whatsoever. Please mute yourselves.
21 If I keep hearing interferences, I am going to ask my clerk
22 to mute everybody. Thank you. Sorry again, Ms Toube.
23 MS TOUBE: Not at all, my Lady. Mr Pyatt is here. He
24 is sitting in the row behind me. He is a Scheme Creditor
25 and also part of the Transparency Task Force, and he does

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1 wish to address you today. We are also aware of two other
2 Scheme Creditors -- I think may be appearing remotely unless
3 they are in court. Mr Chris Allan and Mr Graham Dickenson.
4 As I say, both of those are Scheme Creditors and both have
5 said that they wish to address the court but do not-----
6 MRS JUSTICE BACON: Can I just get their names?
7 MS TOUBE: Yes. Mr Chris Allan, A-L-L-A-N.
8 MRS JUSTICE BACON: Yes.
9 MS TOUBE: And Mr Graham Dickenson, that is
10 D-I-C-K-E-N-S-O-N.
11 MRS JUSTICE BACON: And should I have had written
12 submissions from them?
13 MS TOUBE: No, there are no written submissions from
14 any of those parties.
15 MRS JUSTICE BACON: All right.
16 MS TOUBE: So they are all appearing without counsel,
17 and as far as I know Mr Allan and Mr Dickenson are appearing
18 remotely, whereas Mr Pyatt, as I say, is here in court.
19 MRS JUSTICE BACON: All right. So, we will have
20 submissions from them in due course. Has there been any
21 agreement as to the division of time? Because we have only
22 got a day set aside for this.
23 MS TOUBE: There has not, except we are all aware that
24 we need to get through this as quickly as possible and as
25 efficiently as possible. Although there are a lot of us

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1 here, the actual points before your Ladyship this morning
2 were relatively limited.
3 MRS JUSTICE BACON: Yes, the main point is the class
4 composition.
5 MS TOUBE: It is. There are also issues about various
6 drafting points.
7 MRS JUSTICE BACON: And notification. I think there is
8 an issue raised by Mr Pyatt.
9 MS TOUBE: Yes, we will come back to that.
10 MRS JUSTICE BACON: All right.
11 MS TOUBE: We have got updated versions of various
12 documents, which I will hand up to you in a moment, in order
13 to deal with some of the points in particular that were
14 dealt with either in my learned friend Mr Bompas' skeleton,
15 or were dealt with in a letter from Leigh Day yesterday,
16 which relates either to drafting points or to how to deal
17 with voting.
18 MRS JUSTICE BACON: Yes.
19 MS TOUBE: So I am hopeful that those points, which I
20 can call, if I might, drafting or mechanics points-----
21 MRS JUSTICE BACON: The nuts and bolts points.
22 MS TOUBE: I hope we can deal with those relatively
23 swiftly once we get to them.
24 MRS JUSTICE BACON: Yes. Yes.
25 MS TOUBE: But, unfortunately, it has all been-- some

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1 of the drafting has been last minute, so-----
 2 MRS JUSTICE BACON: Yes.
 3 MS TOUBE: -- we will have to just deal with that.
 4 MRS JUSTICE BACON: In terms of my decision, what is
 5 the timing that you are expecting? Are you expecting me to
 6 give judgment today, by way of an ex tempore judgment, or
 7 are you expecting me to reserve? And, if the latter, have
 8 you any requests as to when my judgment should be given?
 9 MS TOUBE: So, the big picture point is that, as far as
 10 the company is concerned, we want the Scheme to go to
 11 sanction as soon as possible and money to get out to Scheme
 12 Creditors as soon as possible. So that is the big point.
 13 In terms of dates, the only question is if we are to convene
 14 meetings, we have to get on with the nuts and bolts of that
 15 sooner rather than later, and also the creditors need as
 16 long to consider the documents before that meeting as
 17 possible, and we do have a sanction hearing in the diary. I
 18 will come back to the submissions that are made by my
 19 learned friends about moving that. So, in terms of timing,
 20 there is nothing that says your Ladyship has to give
 21 judgment today. It might be that you are minded to say what
 22 the outcome is. So, in other words, we could look at the
 23 Convening Order and say it is one class or it is two classes
 24 or whatever your Ladyship decides, and then the judgment
 25 reasons could be delivered later. We are really in your

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1 hands as to the most effective way to deal with that.
 2 MRS JUSTICE BACON: Well, yes. Let us take the two
 3 scenarios, just assuming that the only issue that is really
 4 going to divide people is the class issue. Now, if I decide
 5 in your favour, are you going to need to be building in time
 6 for an appeal?
 7 MS TOUBE: Decide in our favour?
 8 MRS JUSTICE BACON: Yes, not by you, but an appeal by
 9 the-----
 10 MS TOUBE: I do not know the answer to that.
 11 MRS JUSTICE BACON: Yes.
 12 MR BOMPAS It would depend on the reasons for your
 13 decision, my Lady, so far as I am concerned.
 14 MRS JUSTICE BACON: Right, well, it may-- Yes. Okay,
 15 let us put it this way: if I were to decide in Ms Toube's
 16 favour for essentially the reason she gives in her skeleton
 17 argument, and I am not saying that that is-- I will not go
 18 into now, but I will address that scenario and then I want
 19 to address the opposite scenario because it is essentially
 20 binary, is it not? It is a binary outcome. Either I decide
 21 in her favour for essentially the reasons given by her, or I
 22 decide in your favour for essentially the reasons given by
 23 you.
 24 MR BOMPAS: Well, my Lady, I would need to take
 25 instructions. I simply could not say now.

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1 MRS JUSTICE BACON: No, you haven't got instructions
 2 already?
 3 MR BOMPAS: I have not got any instructions on that
 4 point and, as for the claiming, there is going to be a
 5 debate, I suspect, not-- going beyond simply the class,
 6 which is into the details of the convening. Now, my
 7 learning friends have produced the documents, which may
 8 resolve our concerns, but then again, I simply do not know,
 9 not having seen them.
 10 MRS JUSTICE BACON: Right, okay. So, you have not got
 11 instructions as to appeal, so we just have to deal with that
 12 as and when. Contrary scenario: if I were to decide,
 13 effectively, in favour of Mr Bompas, effectively, for the
 14 reasons that he gives, would you be still wanting to get on
 15 with things as quickly as possible, or would you then say,
 16 in that case, you are going to go away and rethink?
 17 MS TOUBE: Well, my instructions are that if your
 18 Ladyship were to adopt Mr Bompas's reasoning, which we think
 19 is completely contrary to authority, we would have to appeal
 20 that.
 21 MRS JUSTICE BACON: You would. So, you do have
 22 instructions to appeal if that were the result.
 23 MS TOUBE: I do. Yes.
 24 MRS JUSTICE BACON: All right. So, in that case, we
 25 would not be looking at putting the sanction hearing in the

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1 diary, because effectively then things would come to a halt
 2 while you pursue the appeal.
 3 MS TOUBE: Yes.
 4 MRS JUSTICE BACON: All right. So, the problem my end
 5 is that I start a trial next week, so I think a lengthy
 6 period of delay is not going to work for me either. So, I
 7 think that where we are at is that either I would give a
 8 result today with reasons to follow in short order, but
 9 those are not going to be detailed reasons, because it is
 10 going to have to be done this week, and I have also got
 11 other things in my diary this week which are not moveable.
 12 So, yes, decision today with brief reasons to follow, or we
 13 come back later this week for a short, effectively, reserved
 14 ex tempore judgment so that I can then deal with it and deal
 15 with any consequential's then before my trial starts next
 16 week. Is everyone available, for example, first thing on
 17 Thursday morning?
 18 MR PYATT: I would be, my Lady.
 19 MRS JUSTICE BACON: That is a rather unexpected-- I am
 20 just going to rise while someone gets the lights back on,
 21 and then you can give me details of your availability on
 22 Thursday.
 23 (10.37 a.m.)
 24 (Short break)
 25 (10.38 a.m.)

8

1 MRS JUSTICE BACON: All right. Let us continue.
 2 MS TOUBE: I am available on Thursday.
 3 MRS JUSTICE BACON: All right.
 4 MS TOUBE: I don't know if Mr Smith and Miss Cooke are.
 5 Mr Smith confirms that he can make himself available, if
 6 that is necessary.
 7 MRS JUSTICE BACON: All right. I think that may be the
 8 best way forward.
 9 MISS COOKE: Apologies. I am not available on Thursday
 10 morning, but I may be able to attend remotely.
 11 MRS JUSTICE BACON: Yes. All right. Well,
 12 provisionally, let us— I think if you can keep Thursday
 13 morning first thing free, and if I can, I will give the
 14 result at the end of today's hearing. If I cannot, you will
 15 get it on Thursday, all right?
 16 MS TOUBE: Thank you very much, my Lady. That is very
 17 helpful. In terms of order of submissions, what we were
 18 going to suggest— Obviously, we are in your Ladyship's
 19 hands as to the most appropriate way to do this, but I was
 20 going to go first. The FCA was going to go second. The
 21 Investor Advocate was going to go third. Mr Pyatt would
 22 then like to go fourth. Mr Bompas would go fifth, and then
 23 if there are any other Creditors who wish to address the
 24 court, we would suggest they could address your Ladyship
 25 then.

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1 MRS JUSTICE BACON: I am not sure Mr Pyatt going fourth
 2 makes much sense because it seems to me from at least
 3 reading his written submissions that there is a large degree
 4 of overlap between what he is saying and what Mr Bompas is
 5 saying. Would it not make more sense for Mr Bompas to go
 6 fourth and then, in so far as Mr Pyatt has additional
 7 submissions, for him to make those afterwards?
 8 MS TOUBE: My Lady, I am only pausing because I do not
 9 think I have seen any written submissions from Mr Pyatt.
 10 MRS JUSTICE BACON: Oh. Well, I have. Has anyone else
 11 received those?
 12 MR PYATT: The Investor Advocate did, and the FCA did.
 13 MRS JUSTICE BACON: All right. Is there any reason why
 14 those were not copied to all the other parties?
 15 MR PYATT: I think (inaudible). I thought the Investor
 16 Advocate would send it on.
 17 MR BANNISTER: I sent them to Clifford Chance. I can
 18 pass them on now.
 19 MR PYATT: Well, he passed on the correspondence, but I
 20 don't think those were written submissions.
 21 MS TOUBE: Well, of course we are in your Ladyship's
 22 hands as to all that.
 23 MRS JUSTICE BACON: All right.
 24 MS TOUBE: I will take a look at what those points are
 25 in due course.

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1 MRS JUSTICE BACON: Yes. All right. Somebody needs to
 2 ensure that those written submissions— We are talking
 3 about a document entitled, "Introduction and Overview" on
 4 the first page. It is six pages of submissions, including
 5 an appendix, and then there is another appendix with another
 6 couple of pages. So, please could that be provided as soon
 7 as possible to all of the counsel here. Mr Pyatt, do you
 8 have any objection to going after Mr Bompas, because you
 9 have presumably—
 10 MR PYATT: No. I'm fine, my Lady. It's fine.
 11 MRS JUSTICE BACON: Right, because I do not want there
 12 to be any repetition, and it seemed to me that a lot of what
 13 you say is already being said by Mr Bompas.
 14 MR PYATT: Yes. If he's talking about classification,
 15 that's correct, but there are other points.
 16 MRS JUSTICE BACON: Yes. There are other points, yes.
 17 All right, so Mr Bompas will go fourth, and then Mr Pyatt,
 18 and then I will hear briefly from Mr Allan and then Mr
 19 Dickenson, and just to say now, I do not expect to be having
 20 lengthy submissions from any of Mr Pyatt, Mr Allan and Mr
 21 Dickenson because, certainly on the question of class
 22 composition, I will have heard from Mr Bompas by that time
 23 already. All right. Thank you.
 24 SUBMISSIONS by Ms TOUBE
 25 MS TOUBE: So, my Lady, if I might just check what you

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1 have had an opportunity to read. I think we were pretty
 2 much agreed on what the reading list should be. I do not
 3 know if you have had an opportunity to read it.
 4 MRS JUSTICE BACON: Yes. I have done most of the
 5 reading on the reading list. In terms of the skeleton
 6 arguments and the witness statement, I have not— So, I
 7 have looked at the whole of the witness statement. I have
 8 looked at the report of the Investor Advocate. The
 9 remainder, I am afraid, I have not got to.
 10 MS TOUBE: Well, I will take you to the things as I
 11 think I need to as we go through. If there is anything in
 12 particular that you would like to see when I offer to skip
 13 over it, please do say so. What I was proposing to do— As
 14 we have put in, obviously, quite a full skeleton argument, I
 15 was proposing to take this matter from my skeleton,
 16 highlighting important points and taking your Ladyship to
 17 documents where relevant. Then, of course, I will deal with
 18 the points raised in Mr Bompas's skeleton as we go through.
 19 Again, I was not proposing to take up time in relation to
 20 most of the authorities, in particular, where the legal
 21 points are not in dispute and the law is well settled.
 22 MRS JUSTICE BACON: No. What I will want to hear from
 23 you both on is the question about class composition and what
 24 authorities there are which address third party claims in
 25 general terms. Just to flag up, I have read the passage in

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1 the judgment of Zacaroli J in the Re Gategroup Limited
 2 [2021] EWHC 304 case which you referred me to. I have also
 3 read some of the Re UDL Holdings Ltd [2002] 1 HKC 172 case,
 4 including from a passage that you did not refer me to. I
 5 would like your submissions in due course on — let me just
 6 find it — on the passage at p.185–186 in relation to third
 7 party claims. That is 185–186 of the UDL Holdings case and
 8 the judgment of Lord Millett, NPJ, but if there are other
 9 authorities which go to the question of third-party claims
 10 and also to the distinction between rights and interests
 11 where third-party claims are involved, that would be very
 12 helpful because, at the moment, I do not think either of you
 13 have cited very much on that, and that maybe because there
 14 is not very much on it.

15 MS TOUBE: Yes. I will take you also to Re Apcoa
 16 Parking Holdings GmbH [2014] EWHC 3849 (Ch), which was a
 17 case we added to the end of the bundle once we saw the way
 18 in which the case was being put, so, yes, I was intending to
 19 take you to that.

20 MRS JUSTICE BACON: All right.

21 MS TOUBE: But I will not, for instance, take you to
 22 cases on releases, for instance, because those are not
 23 really the issues before your Ladyship today. So, as your
 24 Ladyship will have seen, at the heart of the Scheme is a
 25 fairly simple proposition, although the mechanisms for

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1 bringing it into effect are a bit more complicated. As your
 2 Ladyship will have seen, the Scheme Creditors have potential
 3 claims against the company, which the company denies. If
 4 those claims were to be litigated, either by Creditors or by
 5 the FCA, that litigation will take time, will be uncertain,
 6 and will ultimately diminish the assets of the company. In
 7 fact, it may lead to no recovery for Scheme Creditors if
 8 they cannot establish their claims, but if the claims are
 9 established, that would force the company into liquidation.

10 MRS JUSTICE BACON: So, you say it is a lose—lose?

11 MS TOUBE: It is. Yes, effectively, lose—lose, and so,
 12 as a result — and in order to ensure that Scheme Creditors
 13 have a certain recovery and have it as soon as possible —
 14 what the Scheme does is to establish a trust which has in it
 15 the monetary value of all the assets of the company which
 16 were sold, a contribution by the Parent of £60 million,
 17 together with a further £2.5 million towards the costs of
 18 the Scheme, and the proceeds of various insurance policies.
 19 So, that trust fund will be distributed, apart from a
 20 reserve to meet other claims, which I will come back to
 21 later.

22 MRS JUSTICE BACON: Yes. £42.5 million or something
 23 like that.

24 MS TOUBE: It is £46.5 million.

25 MRS JUSTICE BACON: Yes.

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1 MS TOUBE: That fund will be distributed in an initial
 2 chunk and then, depending on what happens with the reserve,
 3 a second chunk to Scheme Creditors in proportion to the
 4 shares that they hold. So, all Scheme Creditors will be
 5 treated the same under the Scheme, and that is an important
 6 point which I will come back to later in the context of
 7 CLOS. Now, in return, the Scheme Creditors will release
 8 their claims against the company. They will also release
 9 some related claims, but not claims against the solvent
 10 third parties against whom they have separate claims, and
 11 again I will come back to that later. They will get
 12 whatever they get from the trust fund, and they will get it
 13 sooner. Now, as your Ladyship knows, this also means that
 14 any application for compensation from the FSCS will go away
 15 because there will be no claim established. I will come
 16 back to all of the detail of this in a minute but, in
 17 essence, that is what the Scheme is about. Now, your
 18 Ladyship may have seen a worked example in the documents,
 19 and it is worth just, I think, taking a look at that at this
 20 point.

21 MRS JUSTICE BACON: That worked example was inserted as
 22 a result of questions raised to the Scheme, and to the
 23 Investor Advocate, I expect.

24 MS TOUBE: Absolutely right. So, it was a suggestion
 25 that was made, which was a lot of Scheme Creditors would

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1 find it difficult to work out exactly what they were going
 2 to get. I think Leigh Day also raised this point, and it is
 3 in Bundle C, tab C1, at p.110 of the bundle. Now, it was
 4 pointed out to me this morning, quite rightly, that column D
 5 does not make any sense and is just a repetition of column
 6 F, but in a slightly less sensible manner, so ignore column
 7 D for now. What you can see is the various share classes,
 8 the settlement per share class, which is just a division of
 9 the money up between the classes. How much— This is
 10 column E. How much each Scheme Creditor will get if it is
 11 just the initial distribution. Column F is how much the
 12 maximum is they could get if all of it is distributed.

13 MRS JUSTICE BACON: But does that include the reserve?

14 MS TOUBE: It does, yes. The difference between E and
 15 F is the reserve. So, E is what we estimate they are
 16 definitely going to get, and F is the higher end. So,
 17 again, as your Ladyship will have seen, that is why we say,
 18 "up to" because somewhere between E and F is what is likely.
 19 Then, G is what the FCA— if the FCA were to fight and win
 20 and make the order exactly as it did, so the £298 million,
 21 that is what the FCA is saying the loss is. So, we thought
 22 that this would help to show your first distribution will be
 23 E, your second distribution, if you get one, will be up to
 24 F, and G is what you would get if you fought and won
 25 everything.

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1 MRS JUSTICE BACON: Is there a comparator here with
2 what would be obtained under the FSCS, or is that
3 effectively G?

4 MS TOUBE: No. The problem is, of course, we do not
5 know which of these claims would be worked out, or what the
6 FSCS would pay and what claims people have, and who is
7 protected, and who is not protected because we would have to
8 work out who is a private investor and who is not a private
9 investor. So, that is a very difficult -----

10 MRS JUSTICE BACON: No. All right, but assuming that
11 someone did have a protected claim, is G effectively the
12 maximum that they would be able to get from-----

13 MS TOUBE: Sorry. Yes. That is correct.

14 MRS JUSTICE BACON: Is it setting a cap?

15 MS TOUBE: It is a cap.

16 MRS JUSTICE BACON: Because obviously there would
17 be-----

18 MR PYATT(?): No. It is not.

19 MS TOUBE: Well, I think-----

20 MRS JUSTICE BACON: No. You can speak later.

21 MS TOUBE: I think the point is that if the company had
22 all the money to pay it, then the FSCS would not need to pay
23 compensation. The FSCS pays the compensation if the company
24 cannot pay all the money.

25 MRS JUSTICE BACON: Yes, yes. Which would be the case,

17

1 yes.

2 MS TOUBE: Which would be the case if it is all
3 litigated out.

4 MRS JUSTICE BACON: Yes.

5 MS TOUBE: So, I think your Ladyship is right that that
6 is the highest figure that would work, assuming the company
7 can pay everything, which it cannot, if it has to pay
8 everybody and litigates and spends all the money on the
9 company litigating.

10 MRS JUSTICE BACON: Yes, but assuming the company had
11 it, that would be the highest they could expect to obtain if
12 the FCA told them--- if they were to bring claims. That is
13 your position, and if they did not get it from the company
14 that they did have protected claims and all of the other
15 conditions were satisfied, then what they did not get from
16 the company they would get from the FSCS up to, of course,
17 the limit per individual, but we are talking about maximum
18 here.

19 MS TOUBE: Yes. Now, what is said, or what might be
20 said is, "Well, the FCA has undervalued that so actually, it
21 is even more than that. So, if I have a claim for a huge
22 amount and I win everything, then there should be another
23 column, which is what I am actually claiming and what I
24 might win," but we have no idea what that figure would be.

25 MRS JUSTICE BACON: I see.

18

1 MS TOUBE: So, we have taken the FCA because the FCA
2 has done an independent investigation into it and has come
3 up with this figure. Now, as your Ladyship knows, the
4 company does not agree this, but this is a useful
5 comparator.

6 MRS JUSTICE BACON: Do we have any figure as to the
7 pence in the pound? I did see a figure of 77p in the pound
8 floating around somewhere.

9 MS TOUBE: Well, the 77 is the percentage of the FCA
10 value if what we end up in is column F. So, column F-----

11 MRS JUSTICE BACON: Oh. It is F against G.

12 MS TOUBE: F against G.

13 MRS JUSTICE BACON: Not E against G.

14 MS TOUBE: No. So, that is why we use the phrase "up
15 to" and you will see that over the page what we have done,
16 we have explained what all these columns are on p.110, and
17 then on 111 we have said, "Well, here is a worked example."
18 You will see paras.1 and 2 explain that, and then you will
19 see the 61 per cent is what would happen if we only end up
20 with E. So, E is 61 per cent and F is 77 per cent.

21 MRS JUSTICE BACON: Right. Yes. That makes sense.
22 Thank you.

23 MS TOUBE: So, I am just reminded, although I think
24 your Ladyship has this point, that of course the various
25 conditions that the FSCS would have to be satisfied,

19

1 including: it is a claim; it is a protected claim; it is a
2 valid protected claim, etc.

3 MRS JUSTICE BACON: Of course.

4 MS TOUBE: So, the only other point it might be worth
5 just looking at while we are in the bundles is at p.344.
6 This is tab 7, and this is the FCA redress amount, which you
7 are seeing reference to. So, it is where the 298 million
8 figure comes from.

9 MRS JUSTICE BACON: Is that sometimes referred to as
10 the restitution amount?

11 MS TOUBE: Yes. Sometimes it is restitution and
12 sometimes it is redress.

13 MRS JUSTICE BACON: But it is the same concept.

14 MS TOUBE: It is. So, that is p.344 at tab 7.

15 MRS JUSTICE BACON: Yes.

16 MS TOUBE: So, again, this is an FCA document which
17 they have agreed can be shown to Scheme Creditors.

18 MRS JUSTICE BACON: Where does that feed into your
19 worked example?

20 MS TOUBE: Well, that is the £298 million which comes
21 in the FCA column G which we just saw.

22 MRS JUSTICE BACON: So, the redressal restitution
23 amount is effectively column G.

24 MS TOUBE: Column G.

25 MRS JUSTICE BACON: All right. So, this simply

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1 provides the workings for column G.
 2 MS TOUBE: It does, and this is to answer one of the
 3 points that was made by my learned friend, Mr Bompas's
 4 clients, which was they could not see where that figure had
 5 come from.
 6 MRS JUSTICE BACON: Yes.
 7 MS TOUBE: So, that is what the Scheme does and how it
 8 works and what the figures are. I thought it might help
 9 just briefly to address your Ladyship on where the various
 10 interested parties are on the Scheme. Starting with the
 11 FCA, and your Ladyship will have seen that the FCA is
 12 supportive of the Scheme, and obviously you will be able to
 13 hear from Mr Smith about their position in due course, but
 14 the FCA is not only entered into the settlement, which is
 15 the underlying basis of the Scheme, given an announcement
 16 supporting the Scheme which we will look at in just one
 17 minute, but has also looked at drafts of the Scheme, the
 18 explanatory statement, and the evidence to ensure that we
 19 are not putting their position inaccurately.
 20 MRS JUSTICE BACON: Yes.
 21 MS TOUBE: It is worth again going back to the bundle
 22 at C4, p.268, and this is the FCA's announcement, which we
 23 call the April announcement. This is their own estimation
 24 of what they have done and also what they believe are the
 25 appropriate the results of what has happened in the company

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1 and in relation to the Scheme. I was going to draw your
 2 attention in particular to p.269, about halfway down, after
 3 the FCA has gone through all the various things it has done
 4 and the conclusions it has reached. There is a paragraph,
 5 "If the sale is ...completed" and that happened yesterday,
 6 "...and the Scheme becomes ...effective" Can I just ask your
 7 Ladyship to read that paragraph?
 8 MRS JUSTICE BACON: So, at that point, the findings of
 9 the investigation will be published. Yes.
 10 MS TOUBE: Then, in the next paragraph is the point
 11 that we have made, which is, the Parent will not make the
 12 redress contribution, and then the following point is the
 13 £298 million redress amount you will see referred to there.
 14 Then in the following paragraph the FCA points out that
 15 although it will not be the full address amount, the FCA
 16 considers it in the interest of the investors to be given
 17 the opportunity to consider the Scheme. Then, there is the
 18 77p figure there.
 19 MRS JUSTICE BACON: I see.
 20 MS TOUBE: I think that is all I was going to ask you
 21 to look at there.
 22 MRS JUSTICE BACON: Is the point that if this were to
 23 go ahead with an enforcement case requiring the payment of
 24 the full redress amount, the money simply would not be
 25 there, even before one takes account of penalty and the

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1 litigation costs.
 2 MS TOUBE: Yes. So that you would not get a Parent
 3 contribution of £60 million, you would have everything being
 4 litigated and, therefore, costs.
 5 MRS JUSTICE BACON: And you would sacrifice the
 6 penalty.
 7 MS TOUBE: And you would sacrifice the penalty.
 8 MRS JUSTICE BACON: Yes.
 9 MS TOUBE: And your Ladyship will have seen from my
 10 learned friend Mr Smith's skeleton that they estimate that
 11 if the Scheme is not agreed, regulatory action would be
 12 uncertain or costly, and would be unlikely to conclude
 13 before 2025. That is a point made in my learned friend's
 14 skeleton at paras.19 to 21.
 15 MRS JUSTICE BACON: Yes. In terms of the timeline,
 16 when would the penalty and redress amount be payable? Would
 17 it be payable only at the end of the FCA enforcement
 18 proceedings?
 19 MS TOUBE: Yes. So, there would have to be enforcement
 20 proceedings. It would be a determination of what, how much,
 21 if any. As you know, again, the company disputes these, so
 22 there would be litigation. There would be a determination
 23 of what, if any, is owed. Then, it would have to be paid,
 24 assuming no appeals, etc. So, that is the time. So, that
 25 £298 million — as I think, again, the FCA very fairly

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1 recognises in their skeleton — is a figure that they have
 2 put on it now, but not necessarily a figure that one would
 3 end up with at the other end.
 4 MRS JUSTICE BACON: I see. So, this is necessarily
 5 provisional because, as described at 21, the FCA board would
 6 have to review all this and be satisfied that the proposed
 7 penalty and restitution amount or redress amount was
 8 appropriate. That would take some time and would involve
 9 notification and submissions from the company. That would
 10 then result in a decision notice. At that point, in
 11 principle, would the penalty and redress become payable, or
 12 would that normally be suspended?
 13 MS TOUBE: I am being reminded from behind, yes. It
 14 does not become payable until one gets to the end of the
 15 adjudication process.
 16 MRS JUSTICE BACON: So, does that mean that the Upper
 17 Tribunal would then hear the appeal from the company, the
 18 reference of the FCA decision, and then at the end of that
 19 process, the penalty would become payable?
 20 MS TOUBE: Yes. So, it is only when you get to the end
 21 of the Upper Tribunal process that you know. Is there a
 22 liability? What is it for, and what is the quantum? That
 23 is the 2025 timeline.
 24 MRS JUSTICE BACON: That is the date. I understand.
 25 MS TOUBE: And that is the reason why the FCA comes to

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1 the conclusion that they do in para.22 of their skeleton,
 2 which is that it is better for investors not to wait for
 3 that. That conclusion is reached even taking into account
 4 possible FSCS recovery, because my learned friends deal with
 5 that in paras.24 to 26 of their skeleton.
 6 MRS JUSTICE BACON: Just so I understand your position
 7 for the company, your position is that in the event that
 8 this procedure was followed, the company would inevitably
 9 refer the FCA decision to the upper tribunal. The company
 10 would not simply accept it.
 11 MS TOUBE: Yes.
 12 MRS JUSTICE BACON: You are saying to me on
 13 instructions the company would be referring it.
 14 MS TOUBE: Yes. So, you will see in the evidence the
 15 company disputes the litigation of the investors and also
 16 the regulatory entity.
 17 MRS JUSTICE BACON: Yes. All right.
 18 So that is the position in relation to the FCA. Then,
 19 in relation to the investor Committee, and I do not know if
 20 your Ladyship did have an opportunity to look at that.
 21 MRS JUSTICE BACON: I do not think I did.
 22 MS TOUBE: So, if we go to the bundle at tab D1, if we
 23 can just look at p.1085 of the bundle.
 24 MRS JUSTICE BACON: So, how was the Committee made up?
 25 MS TOUBE: So, you can see from the executive summary,

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1 but if I can just summarise it this way: there are nine
 2 members of the Committee, and there was a call for anyone
 3 who wanted to apply, and then there were a certain number
 4 of institutional investors and a certain number of retail
 5 investors. You will see, for example, at p.1087, para.3.1:
 6 "The Committee members are drawn from a range of
 7 backgrounds, and I would describe some of them as
 8 sophisticated individual investors as well as being familiar
 9 with the financial services industry."
 10 But there were also— Once there had been eight, there
 11 was a ninth added, and you can see this from para.2.5, and
 12 that was somebody who was a member of the Leigh Day/Harcus
 13 Parker claimant group. There may have been more, but there
 14 was one who was specifically chosen for that purpose. So we
 15 ended up— or they ended up with nine investors on that
 16 committee and, again, it is probably worth your Ladyship
 17 looking at this report when you have a moment rather than my
 18 taking you through all of it.
 19 MRS JUSTICE BACON: I have noted it. I will do.
 20 MS TOUBE: What you will see is that it was an
 21 iterative process. So, they asked questions of the company,
 22 they asked questions of the Parent, they asked questions of
 23 the FCA, and they met with representatives of all those
 24 persons. So, they conducted their own investigation,
 25 effectively, into the matters that they wanted to ask, and

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1 although they did not get all the answers they wanted, they
 2 did get enough answers for them to be able to determine what
 3 they thought of the Scheme. So, at para.1.9 on p.1085, you
 4 will see that, "8 members of the Committee supported the
 5 Scheme, and one remained undecided."
 6 MRS JUSTICE BACON: So, which— So, paragraph—
 7 MS TOUBE: Paragraph 1.9, on p.1085.
 8 MRS JUSTICE BACON: All right.
 9 MS TOUBE: We can also see from para.3.19, which is on
 10 p.1093, you will see that:
 11 "One member said they found it difficult to recommend
 12 the Scheme from the perspective of an individual investor
 13 due to the lack of ability to negotiate any of the terms of
 14 the Scheme and there being no real insight into the
 15 likelihood of success of the litigation. The remaining
 16 members, some of whom took comfort from the investigations
 17 carried out by the FCA and its support for the Scheme, and
 18 after raising concerns over the oversight of the Reserve
 19 Amount, expressed their support for the Scheme."
 20 It is worth looking at a couple of other paragraphs in
 21 this. Going back to p.1085, at para.1.11, you will see this
 22 is the conclusion of the Chair. Can I just ask your
 23 Ladyship to read that paragraph, para.1.11?
 24 MRS JUSTICE BACON: (After a pause) Yes.
 25 MS TOUBE: So, they say they do not— they cannot say

27

1 they have achieved the best possible outcome for investors,
 2 and I should say that is a matter that, if necessary, I will
 3 come back to at sanction, but schemes do not have to be the
 4 best schemes, and they just have to be better than the
 5 relevant alternative. Then there are, of course, fairness
 6 questions, but if a scheme has a support of a representative
 7 majority, then the court will always be slow to differ from
 8 that majority because it is for creditors to determine their
 9 own interests, and they, of course, express those by voting
 10 for or against the Scheme.
 11 MRS JUSTICE BACON: What this paragraph does not
 12 address, I think, is the availability of FSCS compensation
 13 for some of the creditors.
 14 MS TOUBE: I think they do deal with that.
 15 MRS JUSTICE BACON: But that is not the counterfactual
 16 in 1.11.
 17 MS TOUBE: No, that is true, but if you look, for
 18 example, at p.1093, at para.3.18, you will see that they do
 19 look at the FSCS position.
 20 MRS JUSTICE BACON: Yes.
 21 MS TOUBE: So, they expressly consider that and say,
 22 "Well, we do not really know. Maybe, maybe not," but you
 23 will see that they took advice on that particular point.
 24 MRS JUSTICE BACON: And just so I understand it, the
 25 FSCS compensation would not simply become payable following

28

1 the conclusion of the FCA redress enforcement proceedings at
 2 the end of the Upper Tribunal but would require separate
 3 proceedings to be brought based on the statutory provisions
 4 relied on. Is that correct?
 5 MS TOUBE: Not— That is unlikely. They would
 6 normally make their own decision, so that the FSCS would
 7 say, "Well, now I have got— Have you made a—" It would
 8 then be up to an investor to make a claim. The FSCS would
 9 consider, "Is that a valid claim?"
 10 MRS JUSTICE BACON: All right, but this paragraph talks
 11 about litigation. What litigation is referred to in that
 12 paragraph? Are we talking about the Upper Tribunal
 13 adjudication? Or are we talking—
 14 MS TOUBE: No, this is the underlying litigation.
 15 MRS JUSTICE BACON: No, what is the "this"?
 16 MS TOUBE: So, the litigation that they are talking
 17 about there is the litigation that is being brought by
 18 people such as my learned friends.
 19 MRS JUSTICE BACON: Yes, so the—
 20 MS TOUBE: So this is not dealing with the FCA
 21 regulatory point.
 22 MRS JUSTICE BACON: It is not dealing— That was my
 23 question. So, if the Scheme was rejected, it would not be
 24 sufficient to make claims from the FSCS that the FCA had
 25 reached its decision and that had been endorsed by the Upper

1 Tribunal. What you are saying is, in addition, there would
 2 have to be the pursuit of the individual civil claims by the
 3 investors. Is that right?
 4 MS TOUBE: I think that is not quite right because I
 5 think that another way of establishing a valid claim would
 6 be to be parasitic on the FCA restitution decision. So,
 7 assuming that that one now gets to the Upper Tribunal, that
 8 is all determined and there is an amount, it is possible
 9 that that may also be a valid claim.
 10 MRS JUSTICE BACON: All right. So they might not have
 11 to go through separate settings?
 12 MS TOUBE: They might not also have to conduct
 13 litigation, yes.
 14 MRS JUSTICE BACON: All right.
 15 MS TOUBE: I am reminded that we had this discussion
 16 last week, and the answer is it is not absolutely clear what
 17 happens when the FCA makes a decision, what the FSCS will
 18 do.
 19 MRS JUSTICE BACON: All right.
 20 MS TOUBE: But, as I say, that is an open question, but
 21 whatever happened, one would have to get to that position
 22 first before having anything that could even potentially be
 23 a valid claim, which is two years down the line.
 24 MRS JUSTICE BACON: This is the reason for your
 25 para.5(5), that the company believes that establishing a

1 claim— a valid claim under the FSCS would be likely to
 2 require litigation and/or regulatory actions. You are
 3 saying it is not clear to you whether the regulatory
 4 proceedings, the FCA proceedings themselves, would be
 5 sufficient, or whether in addition civil proceedings under
 6 the relevant statutory provisions would need to follow their
 7 course.
 8 MS TOUBE: Yes. So, just to finish up on this point, a
 9 couple of other points which are worth looking at in this
 10 report. So, p.1091, and this is para.3.10.1, you will see
 11 reference there to what I told your Ladyship about meetings
 12 with the Parent. So, there was a representative of the
 13 Parent who came to talk to the Investor Committee and was
 14 asked, "Would you put any more money in?" And the Parent
 15 said, "No."
 16 MRS JUSTICE BACON: Yes.
 17 MS TOUBE: Then, just to finish that point, if you look
 18 over the page onto p.1092, at para.3.13.6—
 19 MRS JUSTICE BACON: Yes, the FCA cannot compel the
 20 Parent to make any more contributions.
 21 MS TOUBE: Exactly, and then, I will not take time,
 22 looking at the time we are taking already, but you will see
 23 if you look at the report that there were a lot of instances
 24 of interaction with the FCA. You have seen already that
 25 comfort was taken from that, including the point that your

1 Ladyship has just noted, but also the fact that return to
 2 the creditors from the FSCS would only be available after
 3 litigation, which we have just spoken about, and the fact
 4 that the Committee took comfort from the extent of the FCA's
 5 negotiations with the company, and that is at 3.14 on 1092,
 6 which you were just looking at.
 7 MRS JUSTICE BACON: And what is not entirely clear from
 8 this report is what is meant by, "Following the conclusion
 9 of the litigation process."
 10 MS TOUBE: Well, yes, I understand that point, but the
 11 position is that whatever— even if the FCA did
 12 automatically result in FSCS compensation, that is two years
 13 down the line, and will take time and money and be uncertain
 14 and all the other things that we have said. So, the other
 15 point just to mention is the reduction of the reserve, and
 16 that is mentioned at para.3.22, which is on p.1093. Your
 17 Ladyship may recall the reserve was originally 50 million,
 18 and after discussions it was reduced to 46.5 million. So,
 19 the Committee has concluded, as a result of all these
 20 investigations, that at least eight out of nine of them
 21 support the Scheme, and the ninth is undecided. Then, the
 22 position of the Investor Advocate, and obviously your
 23 Ladyship will hear from the Investor Advocate, but you will
 24 have seen the report, which is at p.987.
 25 MRS JUSTICE BACON: Yes, I have read that.

1 MS TOUBE: I was not proposing to take you to that
 2 because I know you have had an opportunity to look at it,
 3 but just noting a few headline points. The first is the
 4 point about the worked example, which obviously we have
 5 taken to heart and have done. The second is the question of
 6 notice, and there, just for your reference, it is p.1002:
 7 "[Considering] the steps that have been taken ... and the
 8 level of engagement ... reasonable efforts have been made to
 9 draw the existence of the Scheme to the attention of the
 10 Scheme Creditors [in the view of the Investor Advocate]."
 11 Then, in relation to class composition – again, for
 12 your note, that is at pp.993 and 994 – the Investor Advocate
 13 has made the same points that we have in relation to this
 14 being rights and not interests, and rights against the
 15 company and not against the FSCS.
 16 MRS JUSTICE BACON: Well, my understanding was that the
 17 Investor Advocate is formally neutral on those points, and
 18 was simply referring the questioners to the briefings from
 19 the company's legal advisors at Clifford Chance.
 20 MS TOUBE: Yes, they are neutral, that is absolutely
 21 right, but they were also stating what the position is as a
 22 matter of the law.
 23 MRS JUSTICE BACON: Yes.
 24 MS TOUBE: The Investor Advocate— Miss Cooke's
 25 skeleton deals with this at para.18.

33

1 MRS JUSTICE BACON: Yes, well, the Investor Advocate
 2 does not advance things— That is not a criticism, but Miss
 3 Cooke's skeleton is setting out, effectively, the neutral
 4 position of the Investor Advocate. The Investor Advocate is
 5 not arguing for a particular application of those
 6 principles, which is quite properly setting out the
 7 principles, and has described the position of the company
 8 and the creditors.
 9 MS TOUBE: Yes, absolutely right, but the fact is, as
 10 we will come on to in a minute, it is absolutely right to
 11 say that one looks at rights against the company and not the
 12 rights against third parties. Before we get to Mr Bompas'
 13 client, the final person we should look at is the FSCS, and
 14 your Ladyship will have seen that the FSCS does not object
 15 to the Scheme. Their position is set out in what is called
 16 the FSCS Non-Objection Letter, which is at p.965 of the
 17 bundle. This is at tab 20, if you are still working from
 18 the hard copy.
 19 MRS JUSTICE BACON: Yes, well, that is very short.
 20 MS TOUBE: It is short, and you will have seen two
 21 points of relevance. First of all, that the FSCS's position
 22 is that it has not made any determination to whether the
 23 company is in default or whether there might be claims
 24 against it, that if it was in default, it would pay
 25 compensation in accordance with its rules, and then claims

34

1 other than the Scheme's claims, and you will have seen we
 2 made mention of this at the end of our skeleton about those
 3 claims that are outside the Scheme, and the FSCS would, if
 4 it paid monies to any of those outside the Scheme payments,
 5 become subrogated. It understands that there is not any
 6 money outside the Scheme, and therefore it would decide
 7 whether it would make any sense to try and recover anything.
 8 Then, para.11 is it does not object. So, that is the FSCS's
 9 position.
 10 MRS JUSTICE BACON: All right.
 11 MS TOUBE: Then, Mr Bompas's clients. The first
 12 question is the class question, which we will come back to
 13 in a minute, and then the second question is roadblocks.
 14 So, there is some suggestion in my learned friend's skeleton
 15 that the reserve could be exhausted, and therefore it is
 16 said that the Scheme is unclear. First of all, that would
 17 not be a roadblock, and secondly, as we have seen, it is
 18 actually clear about what the minimum return could be. We
 19 have seen that from the worked example. Then, the only
 20 other points are the nuts and bolts points. So, that is, in
 21 outline, everybody's positions. I was now proposing to take
 22 this from our skeleton, starting at para.2, and I was not
 23 proposing, particularly bearing in mind the lack of time, to
 24 go through all the background which is set out there.
 25 MRS JUSTICE BACON: You can take it that I have read

35

1 your skeleton argument.
 2 MS TOUBE: Thank you. What you will see is that this
 3 is a compromise. The company does not accept the validity
 4 of the claims, but the FCA has reached the conclusion that
 5 it has reached. Now, before we look at any of these points,
 6 my learned friends have picked up a couple of drafting
 7 points. In particular, the phrase "Scheme Creditor" is used
 8 in slightly different wording. As your Ladyship can
 9 imagine, that is what happens when one is drafting lots of
 10 different documents, in particular because the Explanatory
 11 Statement is supposed to be a summary of the Scheme, but
 12 what we have tried to do overnight is to redraft these
 13 various bits and pieces so that, for example, in relation to
 14 Scheme Creditors, it just is cut and pasted from the rules,
 15 and also, the Explan will say, if the Scheme Rules say
 16 something different, it is the Scheme Rules that apply.
 17 So, there is quite a lot of redrafting that has
 18 happened to lots of things. I think probably it makes sense
 19 just to hand it round now. Nobody is going to have any time
 20 to look at these bits and pieces now, but I suggest people
 21 look at it over lunch and if there are any issues on it,
 22 your Ladyship can be notified of them. What we have done is
 23 we have done it in clean and also mark-up, so everybody can
 24 see all these changes. There are a lot of documents, but
 25 there are not actually a lot of changes. The biggest

36

1 changes are to the voting form because my learned friends
 2 picked up a lot of points on those. In relation to the
 3 voting form, we would be very happy to have any further
 4 points that Mr Bompas and his clients come up with on that.
 5 We want to make it as clear as possible. In relation to the
 6 Leigh Day letter, which picked up a whole load of additional
 7 points, what I was proposing to do was put together a
 8 schedule which deals with those point by point, and then
 9 just say, "Here are all the answers to that," rather than,
 10 in a very laboured way, going through it all with your
 11 Ladyship this morning.

12 MRS JUSTICE BACON: Yes. Are you saying you will just
 13 hand up your schedule? All right, that is useful.

14 MS TOUBE: So, the schedule is not— Ah, it is now.
 15 We were having problems printing it this morning. So, what
 16 I have got for your Ladyship is all the various documents
 17 with post—it notes on the front of them trying to identify
 18 what they are, and the schedule with the Leigh Day document,
 19 and there are bundles which can be handed out with all of
 20 this. Obviously, having got my learned friend's letter
 21 yesterday, we have been working hard to deal with all these
 22 points.

23 MR BOMPAS: My Lady, the letter came yesterday because
 24 we had the papers, effectively, on the Friday. (Inaudible).

25 MRS JUSTICE BACON: I do not suppose that there is

37

1 anyone who has or could prepare a supplemental bundle with
 2 all of the new documents in? Is that it? Does that contain
 3 all of these? All right, let me hand these back. Is this
 4 available in electronic form? Could it perhaps just be sent
 5 to my clerk? All right, let us give this back.

6 MS TOUBE: The one thing that is not in the bundle is
 7 the schedule.

8 MRS JUSTICE BACON: No, and I have got that.

9 MS TOUBE: So, let me give you the bundle.

10 MRS JUSTICE BACON: If someone could send that to my
 11 clerk before lunch, that would be very helpful.

12 MS TOUBE: Yes, of course.

13 MRS JUSTICE BACON: All right. Is there a spare copy
 14 that my judicial assistant could use? Many thanks.

15 MS TOUBE: Do you need also a spare copy for the
 16 schedule?

17 MRS JUSTICE BACON: And of the schedule. All right.

18 MS TOUBE: So, I was not actually proposing to go
 19 anywhere near the schedule possibly until at some point much
 20 later today, once we get to all those nuts and bolts
 21 questions. I would much rather focus on the class points
 22 with your Ladyship this morning.

23 MRS JUSTICE BACON: Well, yes. When are you going to
 24 sit down? Because if you are going to go into the
 25 afternoon, are we going to finish today?

38

1 MS TOUBE: I am hoping not to go into the afternoon.
 2 What I was hoping to do is finish my submissions, and then
 3 it may be we need a sweep up on the nuts and bolts, because
 4 the only question is how exactly the voting form is phrased.

5 MRS JUSTICE BACON: Can I suggest, then, that everyone
 6 makes their submissions on class composition, over lunch
 7 everyone can look at the schedule, and after I have heard
 8 everyone on class composition, I will then have submissions
 9 from everyone on all of the other issues. Does that make
 10 sense?

11 MS TOUBE: It might make more sense to deal with all
 12 the issues except for this, except for the voting form, this
 13 morning, because then we can just— because a lot of those
 14 are not contentious.

15 MRS JUSTICE BACON: Yes, all right. That is fine. So,
 16 everything other than the schedule we will deal with, and
 17 then we will come back to the schedule at the end of the
 18 day. Is that your proposal?

19 MS TOUBE: Yes. So, in the interest of time, I am
 20 going to skip to para.5 of the skeleton, which deals with
 21 the relevant alternative. I am not going to say very much
 22 more than what is already in there, except—

23 MRS JUSTICE BACON: No, I have read that.

24 MS TOUBE: — draw your Ladyship's attention to the
 25 relevant alternative in insolvency, which you know. Then, I

39

1 think, we can go straight to para.11. That section deals
 2 with the background which, as I said to your Ladyship, I am
 3 not going to deal with except for noting a couple of points.
 4 Paragraph 15, there were 9 different share classes, and
 5 para.16, there are 133 direct investors.

6 MRS JUSTICE BACON: The 9 share classes are on the
 7 worked example table?

8 MS TOUBE: Yes. So, para.16, I was just setting out
 9 different sorts of investors, so there are 10 individual
 10 investors, but then there are funds of funds and there are
 11 intermediaries. Most of them are intermediaries, so we have
 12 got 10 individuals, 19 funds of funds, and 104 brokers. So,
 13 we think that there are approximately 250,000 Scheme
 14 Creditors.

15 MRS JUSTICE BACON: So, 10 individuals, 9 funds of
 16 funds—

17 MS TOUBE: 19.

18 MRS JUSTICE BACON: 19, sorry, and how many brokers?

19 MS TOUBE: 104.

20 MRS JUSTICE BACON: 104, and the investors represented
 21 by Mr Bompas fall into which category?

22 MS TOUBE: We do not know that.

23 MRS JUSTICE BACON: But presumably not the 19 funds of
 24 funds?

25 MS TOUBE: No, presumably not.

40

1 MRS JUSTICE BACON: So, either category one or three?
 2 MS TOUBE: Yes, presumably.
 3 MRS JUSTICE BACON: All right.
 4 MS TOUBE: So, the point — and this is, of course, why
 5 the voting issue becomes what it becomes — is there are lots
 6 and lots of creditors holding in lots and lots of different
 7 sorts of ways. So, paras.20 to 24 just set out the way in
 8 which the WEIF was suspended.
 9 MRS JUSTICE BACON: Which led to the FCA investigation.
 10 MS TOUBE: It did. So, the preliminary conclusions are
 11 set out in paras.25 to 27. 26 in particular is a summary,
 12 and 27 is the restitution that we have already seen.
 13 Paragraphs 28 onwards are the litigation claims, and you
 14 will have seen that most of these are for damages for breach
 15 of the COLL Rules and breach of duty claims under 138D of
 16 FSMA, and you will know that my learned friends say that
 17 makes them different sorts of creditors. We will come back
 18 to that in a minute. Those claims have been said, in
 19 correspondence, as we point out at 29.1, to be £300 million
 20 claims. So that was the point I was making to your Ladyship
 21 earlier about these creditors may say, "Well, I have more
 22 claims than the FCA has found that I do."
 23 Paragraph 30 makes the point again that the claims are
 24 disputed by the company, and para.31 points out that there
 25 are also potential claims between LFSL and HL, Hargreaves

41

1 Lansdown, and Depositary, and that is the third-party point
 2 to which we refer later, but it does not seem to be picked
 3 up. It was picked up in correspondence but does not appear
 4 in my learned friend's skeleton. Then we get the section
 5 about the settlement. We have already seen that. Then, the
 6 sale of the company's business in para.34 onwards.
 7 MRS JUSTICE BACON: And do you say that the sale was
 8 concluded yesterday?
 9 MS TOUBE: It was, yes. The bottom-line point on the
 10 sale is the one that we pull out in para.36, which is the
 11 total sum for the sale is £140 million, total sum due to the
 12 company is £80 million. So, that is where that comes in.
 13 MRS JUSTICE BACON: And that is the sale price that
 14 goes into the pot?
 15 MS TOUBE: That is the sale price that goes into the
 16 pot, and the FCA has confirmed that it has received
 17 appropriate information that that is fair value. Then, we
 18 get into the Scheme itself at para.37, which summarises the
 19 Scheme. In terms of releases, we deal with those in
 20 para.38. There is no issue in relation to releases before
 21 your Ladyship, but just so you can see what they are, the
 22 first lot is a general release of the Company for Scheme
 23 Creditor claims.
 24 MRS JUSTICE BACON: Yes, I have read that, and I have
 25 also read the corresponding section of Mr Midl's witness

42

1 statement.
 2 MS TOUBE: Thank you. So, we have got general release,
 3 we have got affiliate releases for ricochet claims, we have
 4 got advisor releases, and we have got the contribution
 5 reduction. Now, the contribution reduction, it is, as we
 6 say, a novel mechanism.
 7 MRS JUSTICE BACON: No, I understand it. It means the
 8 point is that you do not want double counting, so insofar as
 9 there is a contribution which then goes back against the
 10 LFSL, against the company, that is reflected in the amount
 11 available.
 12 MS TOUBE: That is right, and so it deals with that
 13 practical point, it deals with the ricochet point, and it
 14 expressly allows Scheme Creditors to sue third parties. It
 15 is just that, if they do, this is what then happens.
 16 Paragraph 40 deals with the various definitions, and again,
 17 I was not proposing to take you to very much there, except
 18 for to point out that there are, in para.42, various people
 19 who are outside the Scheme. None of that is relevant for
 20 today, and para.43, as we say, it is up to the company to be
 21 able to decide who is inside and who is outside the Scheme.
 22 MRS JUSTICE BACON: Yes. Now, Scheme Creditor, is your
 23 para.44(1) still correct or has that now changed following
 24 the drafting amendments?
 25 MS TOUBE: No, that is correct.

43

1 MRS JUSTICE BACON: So, this is correct. So, can we
 2 just look at that to make sure (inaudible)?
 3 MS TOUBE: Yes, just to make it clear, the Scheme Rules
 4 have changed very, very minimally, so anything which is a
 5 reference to the Scheme Rules is actually — is right.
 6 MRS JUSTICE BACON: So, 178, "or at which each person
 7 who holds a Scheme Claim" and then "Scheme Claim or actual,
 8 potential, alleged, present or disputed liabilities ." I
 9 see. How do you identify people with potential liabilities ?
 10 MS TOUBE: Well, they will be investors.
 11 MRS JUSTICE BACON: So, would it — This is probably a
 12 very stupid question, but would it — It seems a little bit
 13 going around the houses to define the Scheme Creditors by
 14 reference to liabilities, which then, in turn, is defined by
 15 reference to investors. Are you simply saying the
 16 investors?
 17 MS TOUBE: Well, we are saying those who have
 18 post-suspension potential claims, remembering that the
 19 pre-suspension liabilities are outside. So, you might have
 20 an investor who had a pre-suspension claim and a
 21 post-suspension claim. Pre-suspension claim is outside — — —
 22 MRS JUSTICE BACON: Yes.
 23 MS TOUBE: — — we are not are dealing with that.
 24 Post-suspension claim inside, we are dealing with that.
 25 MRS JUSTICE BACON: All right. Well, assuming that

44

1 this definition is adopted, is there any problem— is there
 2 issue taken by anyone with this definition , or was it a
 3 different definition that the problem-----
 4 MS TOUBE: I am not sure there was actually any issue
 5 taken with any of the definitions , just that they were not
 6 all the same.
 7 MRS JUSTICE BACON: I see. So-----
 8 MR BOMPAS: My Lady, perhaps I can help my learned
 9 friend. There is, I think, a distinction between claims and
 10 investments, and what is the subject of the Scheme is
 11 claims, not beneficial interests in units. In the
 12 definition in the rules, in contrast with my learned
 13 friend's skeleton, there is actually a reference to
 14 beneficial interests in units, and what I think is intended
 15 is that those who were entitled themselves to units
 16 indirectly as the beneficial owners through a trust
 17 arrangement would be the folk who would then likely have
 18 claims, which claims are to be compromised as far as they
 19 have been assigned or retained by the investors passed
 20 (inaudible).
 21 MRS JUSTICE BACON: Okay, but my short question was is
 22 it said by anyone that this definition of Scheme Claim is
 23 lacking in clarity so that people do not know whether they
 24 are in or out?
 25 MR BOMPAS: Not in the-----

1 MRS JUSTICE BACON: No.
 2 MR BOMPAS: -- actual definition in the rules.
 3 MRS JUSTICE BACON: No, all right, and so the problem
 4 was the inconsistency between definitions, not-----
 5 MR BOMPAS: And the explanations for it.
 6 MRS JUSTICE BACON: All right. Okay, which I think is
 7 being resolved. All right. Thank you. Just to let you
 8 know that perhaps in about five minutes we will take a
 9 transcriber break, but you should just finish your
 10 submissions at an appropriate time. I do not want to stop
 11 you mid-flow.
 12 MS TOUBE: Thank you. That is very helpful. I suspect
 13 I will have got to class, and then I will stop.
 14 MRS JUSTICE BACON: All right.
 15 MS TOUBE: So, the Scheme terms as set out in para.44,
 16 I was not, as I say, going to take you to any of those.
 17 MRS JUSTICE BACON: No, that is fine.
 18 MS TOUBE: I suppose the only point that I should just
 19 mention, although your Ladyship will have seen it, is in
 20 44(12), which deals with the liquidation fallback if the
 21 WEIF is dissolved. So, it may be that a time were to come
 22 that the WEIF is dissolved and has to go into an insolvency
 23 process for some reason or another, and so the question is
 24 how does one deal with those people who are Scheme
 25 Creditors? And the answer is that they will receive a share

1 of the trust assets, and so effectively the trust will stay,
 2 and they will get that.
 3 MRS JUSTICE BACON: Yes.
 4 MS TOUBE: So, that is just to deal with a sort of
 5 fallback eventuality, and then sub-s.(13) is termination,
 6 and sub-s.(14), I suppose I should mention, which is the
 7 role of the Scheme Supervisors, so they are going to deal
 8 with distribution and also the reserve. So, the company is
 9 not dealing with that, that is Scheme Supervisors, and they
 10 are independent, as your Ladyship will have seen.
 11 MRS JUSTICE BACON: Yes.
 12 MS TOUBE: Then we go on in para.45 to the "Relevant
 13 Alternative."
 14 MRS JUSTICE BACON: Yes, and I think you have taken me
 15 through a lot of that already.
 16 MS TOUBE: Yes, and your Ladyship already has the point
 17 about the 50 million penalty.
 18 MRS JUSTICE BACON: Yes.
 19 MS TOUBE: And we have dealt with the FCA and the IC.
 20 So, this then takes us to s.E, which is "Issues for the
 21 court at [this] hearing," which your Ladyship will be very
 22 familiar with.
 23 MRS JUSTICE BACON: Yes.
 24 MS TOUBE: First of all, "emphatically not" the merits,
 25 as we always are required to say. Secondly, the question of

1 class composition. Thirdly, the question of jurisdictional
 2 block. I do not know if your Ladyship wants a definition of
 3 "roadblock" at this point. You will have seen we have set
 4 out the relevant passages or at least reference to the
 5 relevant passages from the three cases.
 6 MRS JUSTICE BACON: And I am not sure that anyone is
 7 suggesting that there is one here.
 8 MS TOUBE: Well, the only point that is made in my
 9 learned friend's skeleton is a point about not making it
 10 clear whether the reserve is or is not going to be used up
 11 and-----
 12 MRS JUSTICE BACON: And are you going to-- you going to
 13 come on to that later?
 14 MS TOUBE: Yes, but the only point I would make now is
 15 that when we talk about roadblocks. You will see if you
 16 have an opportunity to look at those authorities which we
 17 cite that they are referred to as a factual legal
 18 submission, which means that it is impossible to conceive of
 19 circumstances in which the court would approve the Scheme at
 20 the sanction hearing. That is the way it is put in the Re
 21 Morses Club Scheme Ltd [2023] EWHC 705 by Leech J. However,
 22 in Re Noble Group Limited [2019] BCC 349, it is put as
 23 whether there are other factors which would unquestionably
 24 lead the court to refuse to exercise its discretion to
 25 sanction the Scheme, and in Re Indah Kiat International

1 Finance Co BV [2016] B.C.C 418 the way that Snowden J, as he
 2 then was, put it, was other issues which would
 3 unquestionably lead to the court declining to sanction the
 4 Scheme. So, that is a very high threshold, and although we
 5 have not spelt this out expressly in the skeleton, this
 6 court does have jurisdiction to sanction the Scheme. It is
 7 an English company. It is a company that is liable to be
 8 wound up under the Insolvency Act, and it has a sufficient
 9 connection to the jurisdiction, and just for your note, that
 10 test is set out in Re NN2 NewCo Ltd [2019] EWHC 1917 (Ch),
 11 which is in the bundle, which is in paras.27 to 28, which is
 12 in our authorities bundle at p.305. So, then we get to
 13 para.56, which is the points the court should consider at
 14 the hearing. I am in your Ladyship's hand if you want me to
 15 deal very briefly with notification before we break for
 16 class.

17 MRS JUSTICE BACON: Yes, why do not you do that? I
 18 think you can probably deal with that in a couple of
 19 minutes, and then we will get on to the class analysis.

20 MS TOUBE: Yes. So, the point is there is no specific
 21 notice period that is required. There has been four weeks.
 22 We have set out in paras.62 to 63 what the company has done.
 23 It has gone to great lengths to inform the Creditors both
 24 directly and by advertisement. The test for notice is
 25 common ground with my learned friend, Mr Bompas, and the

1 learned friends accept in their skeleton that the
 2 requirements for notice have been made out. So, that is
 3 really all I was going to say about the notification, which
 4 is it is sufficient.

5 MRS JUSTICE BACON: Yes, can you just give me the
 6 reference to the Investor Advocate report point that you
 7 make at para.64? Just the paragraph number will do.

8 MS TOUBE: Can I give that to you just after we break?
 9 I know that is somewhere else in our bundle.

10 MRS JUSTICE BACON: Yes, thank you. All right, let us
 11 break and then we will come to the class analysis at the
 12 end.

13 (11.44 a.m.)

14 (Short break)

15 (11.52 a.m.)

16 UNKNOWN COUNSEL: My Lady, before my learned friend
 17 gets back, can I raise a small administrative problem?

18 MRS JUSTICE BACON: Yes.

19 UNKNOWN COUNSEL: I am told that I am inaudible on the
 20 live feed. I do not know if my learned friend here will be
 21 audible on that, or whether that is the microphone-----

22 MRS JUSTICE BACON: Well, perhaps when you speak-----

23 UNKNOWN COUNSEL: -- or something else.

24 MRS JUSTICE BACON: When you speak you can just-- and
 25 perhaps even now you should swivel that microphone in your

1 direction.

2 UNKNOWN COUNSEL: But if it is the live feed rather
 3 than the shorthand writer, then that (inaudible) possible.

4 MRS JUSTICE BACON: Well, I do not-----

5 UNKNOWN COUNSEL: I do not know how this has all been
 6 arranged, unfortunately.

7 MRS JUSTICE BACON: Well, I do not either, so I think
 8 perhaps you should just swivel that microphone in your
 9 direction.

10 UNKNOWN COUNSEL: Okay. I hope I do not have to
 11 displace my learned friend to make my points.

12 MRS JUSTICE BACON: No. Also, I am told there is not a
 13 transcriber. I mistakenly thought that there was. Is it
 14 correct? Is there no transcriber, or do we have a
 15 transcriber?

16 CLERK OF THE COURT: They are doing it remotely I am
 17 told.

18 MRS JUSTICE BACON: I see. All right. Well, in that
 19 case, if the shorthand writer then cannot hear you either,
 20 someone will tell us. Now, the other point of
 21 administration is that I understand that Mr Pyatt would like
 22 a copy of the company's skeleton argument because he has not
 23 had it. Are you content for that to be provided by my clerk
 24 directly to Mr Pyatt?

25 MS TOUBE: Yes.

1 MRS JUSTICE BACON: All right. Thank you very much.
 2 So, I will hear you now on class composition.

3 MS TOUBE: Yes, the last point you asked me was the
 4 cross-reference to the point in para.64 about the Investor
 5 Advocate.

6 MRS JUSTICE BACON: Yes.

7 MS TOUBE: That is bundle C, tab 28, p.1002, and it is
 8 para.7.1.2 of the report.

9 MRS JUSTICE BACON: Thank you very much.

10 MS TOUBE: So, we set out the class analysis. The
 11 standard test. There is nothing between us here. We are
 12 looking at rights and not interests, and we are looking at,
 13 in terms of a class, the class being confined to persons
 14 whose rights are not so dissimilar as to make it impossible
 15 for them to consult together with a view to their common
 16 interest. So, as we point out in para.67, we are looking at
 17 two considerations. First of all, the rights that Creditors
 18 would have if the Scheme were not implemented, sometimes we
 19 have got those rights in, and the rights that the Creditors
 20 would have if the Scheme were implemented and sometimes we
 21 got those rights out, and that comes from Re Hawk Insurance
 22 Company Limited [2001] 2 BCLC 480 as we say in para.67, and
 23 the way in which one looks at these and analyses them is, as
 24 we point out in para.68, to analyse the rights in the
 25 comparator. So, in other words, what would happen if the

1 Scheme were not to proceed? And we refer there to Re Port
2 Finance Investment Ltd [2021] EWHC 378 (Ch), and I think it
3 is just worth looking at Port Finance briefly on this point.
4 It is at tab 15 of our authorities bundle, p.372. It is
5 paras.78 to 79.

6 MRS JUSTICE BACON: Yes.

7 MS TOUBE: So, I just invite your Ladyship to read
8 those two paragraphs.

9 MRS JUSTICE BACON: Yes.

10 MS TOUBE: So, the first point is that even if you do
11 have rights which are different from each other and those
12 differences are material, you still do not necessarily have
13 separate classes, and the second point is the one that we
14 cited this for, which is you look at the comparator, and
15 that is important in this case because the comparator here
16 is insolvency, and the Scheme Creditors are all unsecured
17 Creditors who in an insolvency would prove pari-passu with
18 each other.

19 MRS JUSTICE BACON: And were--- in this, is there any
20 point made about rights as against the company rather than
21 rights as against third parties?

22 MS TOUBE: I am sorry. I do not understand.

23 MRS JUSTICE BACON: Does this authority refer to the
24 relevant rights being rights as against the company or under
25 the Scheme rather than rights of-----

53

1 MS TOUBE: It does not, I do not think, use the words
2 "Against the company." I think we actually did a search for
3 every case where it said, "Against the company," and it used
4 to be spelled out in the practice statement, but then the
5 practice statement started to apply to para.26A Schemes as
6 well where it does not have to be a creditor, it can be a
7 person with rights that are affected, and so that wording
8 fell out of the practice statement. So, a lot of the times
9 when you find it in a case, it is a direct quotation from
10 the practice statement itself, but I am going to take you to
11 at least those cases which I think are particularly helpful,
12 which do use the phrase "Rights against the company." The
13 reality is that it is very rare for someone to run with this
14 point because it is absolutely clear that it is rights
15 against the company, so there are not that many cases that
16 deal with this issue. Apcoa is one of those cases, which is
17 why we put it in the bundle. So, para.69, we refer to UDL,
18 and it is useful to go to UDL here. That is in tab 5 of the
19 bundle. The first paragraph we referred to in our skeleton
20 was para.16---I am sorry, p.184, which we set out there, and
21 you will see there the phrase "Against the company" is
22 expressly used there.

23 MRS JUSTICE BACON: Page 184 of the UDL, but page what
24 of the bundle?

25 MS TOUBE: It is p.129 of the bundle, and you will see

54

1 it is para.3.

2 MRS JUSTICE BACON: Yes.

3 MS TOUBE: Before we go to the point that your Ladyship
4 was making, which we will deal with in a moment, but if we
5 go back to p.179 of that judgment, which is p.124 of the
6 bundle, you will see where the discussion starts about this
7 case, where Lord Millett is dealing with the various cases.
8 He sets out all the principles, and then he says:

9 "There is a notable degree of
10 consistency in this line of authority.
11 The principle upon which the classes of
12 Creditors or members are to be constituted
13 is that they should depend upon the
14 similarity or dissimilarity of their
15 rights against the company and the way in
16 which those rights are affected by the
17 Scheme and not upon the similarity or
18 dissimilarity of their private interests
19 arising from matters extraneous to such
20 rights."

21 MRS JUSTICE BACON: Yes.

22 MS TOUBE: And then, to make that good in that case, we
23 go to p.130 of the bundle, so p.185 of the report and that
24 deals with the application to the facts of the present case,
25 and this is the point which your Ladyship was mentioning to

55

1 us earlier, and this deals with the position of the
2 preferential Creditors, as you will see, and at G some of
3 those former employees had preferential claims and a special
4 interest in opposing the Schemes not shared by other
5 Creditors, including other preferential Creditors of any or
6 not such employees, and that special interest was the ex
7 gratia payments out of the protection of wages on insolvency
8 fund, which entitles the board by way of subrogation to
9 payments by the liquidator, and so effectively the board
10 pays out, and that is not dissimilar from the FSCS in the
11 present case, and what does the court say in relation to
12 that over the page? At B, "This is, however, exactly the
13 kind of private interest not deriving from any legal right
14 against the company, which may properly influence the
15 creditor to vote against the Scheme, but which does not
16 entitle him to demand a separate meeting of himself and
17 others in a similar position," and then the point is made
18 "Otherwise, there would be a right of veto."

19 MRS JUSTICE BACON: Is that a good analogy, or is it a
20 flawed analogy?

21 MS TOUBE: Well, what it makes the point about is two
22 things. First of all, it says what you are looking at is
23 rights against the company --- rights against somebody else
24 are just interests --- and, secondly, the actual example in
25 that case in Hong Kong was of a claim that could be made

56

1 against a third party who would then pay out and then
 2 subrogate in, which is similar in type to the FSCS position.
 3 MRS JUSTICE BACON: Yes.
 4 MS TOUBE: So-----
 5 MRS JUSTICE BACON: And I think the point being made
 6 here is that there are different classes of rights, some of
 7 which carry with them the FSCS backup, if you like, and some
 8 of which do not, i.e. the tortious claims, that is what is
 9 said.
 10 MS TOUBE: Yes, so what is said is two things. The
 11 first thing that is said is there are two different sorts of
 12 claims. There are claims which are, so say my learned
 13 friends, really good claims, based on 138D, and claims which
 14 are tort claims, which are less good claims. The other
 15 thing that they say is that the claims which are the 138
 16 claims are backed by the FSCS and the others are not.
 17 MRS JUSTICE BACON: Yes, well, leaving aside the good
 18 and the not so good claims, I think that the key point being
 19 made is the backed by the FSCS, so it is difference in
 20 quality. That is what is being said.
 21 MS TOUBE: Yes.
 22 MRS JUSTICE BACON: And that seemed to me somewhat
 23 similar to the position being canvassed here with
 24 employees-- well, with some Creditors who were employees as
 25 opposed to other Creditors who were not employees, and the

1 employees would then have possible X greater payments from
 2 the third party which the non-employees would not.
 3 MS TOUBE: Yes, and so what we say is that the way you
 4 look at this is you should say, "What are the rights against
 5 the company?" The rights against the company are all the
 6 same between the retail investors and the institutional
 7 investors, but retail investors may also have a claim
 8 against somebody else. As a matter of Scheme principles,
 9 that is an interest and not a right, and you do not make it
 10 into a different right against the company by saying, "I am
 11 bolting on a right against somebody else to make my right
 12 against the company different."
 13 MRS JUSTICE BACON: Is there any definition of interest
 14 as opposed to right?
 15 MS TOUBE: Well, there are a number of cases.
 16 MRS JUSTICE BACON: Are you going to come onto those?
 17 MS TOUBE: I will. There are cases in which somebody
 18 says, for example-- there are all sorts of things that one
 19 looks at to see whether they are rights or interests. So,
 20 for example, if someone has a cross-holding between classes,
 21 that is an interest, not a right. If somebody is getting a
 22 fee, that may be either an interest or it may be a right
 23 that does not factor the class. So, there are lots of cases
 24 about these different sorts of things, but all of those
 25 things are rights against the company. They have got to be

1 a right against the company to be a right in the first
 2 place. If they are not a right against a company, they
 3 cannot be anything more than an interest.
 4 MRS JUSTICE BACON: Yes.
 5 MS TOUBE: So it is for that reason we say that the
 6 principles that my learned friend set out in their skeleton
 7 about how one works out classes are right, except that they
 8 miss out the phrase "Rights against the company," and I will
 9 come back to a few more cases where we look at that in a
 10 minute, but first of all let us just look at what are the
 11 cases, and we set that out in para.70 of our skeleton. So,
 12 the first point is, and I think it is worth making this
 13 point, in many Scheme cases there are lock-up agreements
 14 with the Creditors, so you know how they are going to vote,
 15 and sometimes what is said is "Oh, well, you are trying to
 16 constitute at your class so that you can get it passed or
 17 vetoed or all the rest of it." We do not have a lock-up
 18 agreement; we do not know how anyone is going to vote.
 19 So, this is not a case where we have decided to
 20 constitute a class in order to get the vote we want. We
 21 actually have no idea, so what we have done is we have gone
 22 by a matter of legal principles and said, "Well, what are
 23 the principles here?" So, para.71, what about the rights
 24 in? The rights in are materially the same. We start by
 25 looking at the rights in the relevant alternative. All of

1 these Creditors are unsecured Creditors with rights that
 2 rank pari-passu, and in subpara.3 it does not matter that
 3 some of the Scheme Creditors have different claims from each
 4 other, as long as they are all unsecured which they are, and
 5 your Ladyship will see that from the quotations which we set
 6 out from Re Cimolai Spa & Ors [2023] EWHC 1819 (Ch) and from
 7 Noble in subpara.3 and 4, and if your Ladyship has not had
 8 an opportunity to look at those paragraphs, that would be
 9 helpful to do so now.
 10 MRS JUSTICE BACON: No, I have.
 11 MS TOUBE: Thank you. So, you will have seen that what
 12 is said by Trower J in Cimolai and by Snowden J in Noble is
 13 it does not matter if you have got different claims and
 14 somebody might have better claims or somebody might be
 15 disputed, the essential question is what would happen if
 16 they proved him in insolvency? And the answer is they had
 17 be unsecure Creditors, and that is the position here. So my
 18 learned friends accept, in their skeleton argument at
 19 para.15, that obviously different investors will have claims
 20 against Link of different values and different legal bases
 21 so that, as contingent Creditors of Link, what each is
 22 giving up under the Scheme will differ. So, they accept
 23 that they are all contingent Creditors, and that is correct
 24 to accept that. So, what you have got is people with
 25 different claims, but they are all provable and just looking

1 at Noble as we are here, you will see in para.98-----
 2 MRS JUSTICE BACON: Yes, this is your point about the
 3 good and the bad claims? The fact that some claims might
 4 have a better prospect of succeeding does not need to be a
 5 separate class constitution.

6 MS TOUBE: Exactly right, and you will notice in both
 7 paras.98 and 100, the phrasing, "Rights against the company"
 8 is used because that is what the court is looking at.

9 MRS JUSTICE BACON: Yes.

10 MS TOUBE: Then in subpara.5 we deal with the argument
 11 that was made in correspondence but is not made in my
 12 learned friend's skeleton as to potential claims that could
 13 be made. I am sorry, this argument is made: the asserted
 14 distinction between institutional and retail investors. So,
 15 the first point we make is the one I have already made,
 16 which is that retail investors might have different claims
 17 from institutional investors, but they also both have causes
 18 of action, and that is accepted by my learned friends in
 19 para.27 of their skeleton, where they say:

20 "Institutional investors, by
 21 contrast, have no claim pursuant to 138D;
 22 they are limited to a claim for a
 23 professional negligence against Link in
 24 tort."

25 Which they say is more difficult, and then they make

61

1 the same point in para.32. So they accept that there are
 2 claims in each of these. They are, as we say, all
 3 pari-passu on secured claims.

4 So, let me come back to the question of rights against
 5 third parties, mostly because I have just got that somewhere
 6 else in my script, but that is rights in. Rights out, we
 7 deal with in para.72. The rights out are again the same.
 8 So, all of the Creditors are being treated in the same way.
 9 That is important, because I will come back to that in the
 10 context of Re Cape Plc and others [2006] EWHC 1316 (Ch),
 11 which my learned friends rely on. Paragraph 73, that is the
 12 point that I was starting to mention earlier, which is
 13 potential claims that some Scheme Creditors might have
 14 against other third parties. I do not think my learned
 15 friends are pursuing that, but just to close it off, it does
 16 not give rise to a class issue either.

17 MRS JUSTICE BACON: I can see your point that if you
 18 have a completely separate claim against a third party,
 19 which this seems to be addressing the claims against HL,
 20 that is not a right against the company, but what is the
 21 position if you have a right as against the company, which
 22 has— or different classes of rights against the company,
 23 which carry with them different consequences for third party
 24 rights. So, this is not a third party right that is
 25 divorced in some way from the rights against the company.

62

1 What is being said is that if you have a s.138D right
 2 against the company, that carries with it, inevitably, a
 3 right under the FCSC Compensation Scheme, leaving aside the
 4 questions for eligibility, but that is part and parcel of
 5 the package, which is different from a situation where you
 6 have, say, a tortious right which does not carry with it the
 7 potential claim under FCSC.

8 MS TOUBE: Yes. I will come back to that in the
 9 conference about Apcoa if I may?

10 MRS JUSTICE BACON: All right.

11 MS TOUBE: But just to jump ahead myself a little bit,
 12 in Apcoa what there was was there was a Turnover Agreement
 13 between various Creditors to which the company was a party,
 14 which depended on what was going to happen under the Scheme
 15 and how it got worked out and all the rest of it, and the
 16 court said:

17 "Well, the turnover right is behind
 18 the curtain. That's an interest. That's
 19 not a right against the company. The
 20 right against the company is only the
 21 rights in, so what rights do you have
 22 against the company coming in, and what
 23 are the rights under the Scheme? What are
 24 the rights coming out?"

25 So, a right which is parasitic on it, so a turnover

63

1 right, for instance, is something that is happening outside
 2 the Scheme.

3 MRS JUSTICE BACON: But was that a right that was
 4 parasitic upon one of the rights against the company?

5 MS TOUBE: Well, yes, because it was only a turnover,
 6 depending on what happened under the Scheme. So depending
 7 on what happened between A and the company, B and the
 8 company had B's rights, but A and B then had to do things
 9 with each other; that is not a right against the company,
 10 and that does not cause a class issue.

11 MRS JUSTICE BACON: All right, so is that the closest—
 12 I mean, I was wondering whether the UDL case was a similar
 13 case, but it is not clear from the short description whether
 14 the ex-gratia payments were parasitic upon particular
 15 rights, save to the extent that it was employees versus
 16 non-employees?

17 MS TOUBE: I do not know any more than what is in the
 18 authority itself.

19 MRS JUSTICE BACON: Yes.

20 MS TOUBE: But what it was in UDL was an additional
 21 right to be paid by somebody else, which came automatically
 22 if you were established to be an employee.

23 MRS JUSTICE BACON: Yes, so the relevant trigger was
 24 whether you were an employee as a class of person rather
 25 than the type of right that you had against to claim?

64

1 MS TOUBE: Well, yes, except you had to have a right
2 against the company with parasitic on it.
3 MRS JUSTICE BACON: Yes. I see. So, if you had an
4 employee-related claim because you were employed, then you
5 could expect to receive the ex-gratia payment; if you had a
6 non-employee-related claim, you could not expect to receive
7 that? So I suppose that is quite similar.
8 MS TOUBE: Yes, it-----
9 MRS JUSTICE BACON: Yes. All right.
10 MS TOUBE: We will come back to Cape because my learned
11 friends rely on Cape, and say, "Oh, well, in Cape, there's a
12 difference between the FSCS group and the non-FSCS group,"
13 but as we will see when we get there, that is because the
14 rights under the Scheme were different. So they were
15 treated differently under the Scheme, so the rights out were
16 different.
17 MRS JUSTICE BACON: I see. All right.
18 MS TOUBE: So, the question that the court has to deal
19 with in relation to one class is to work out whether the
20 rights are-- Even if there were different rights, which we
21 say there are not, whether they are so dissimilar so that
22 the Creditors cannot consult together and we just point out
23 what Sir Alastair Norris has said in the Re All Scheme Ltd
24 [2021] EWHC 1002 (Ch), which is the question about whether
25 or not all Creditors might have in common the fact that they

65

1 want to be paid-- get a better outcome. So, even if we got
2 to the point, which we do not, that these were different
3 rights, the rights would not be so dissimilar that the
4 parties cannot consult together but, as I say, we do not get
5 there in the first place, so we are in a one-class
6 situation.
7 Now, then we go on to look with things that might be
8 said to split the class. Paragraphs 77 to 79 deal with the
9 different types of shares; nobody is suggesting that splits
10 the class. Then we deal with the FSCS conversation points.
11 So, coming back to the point we have just been looking at,
12 we can start, I think, with Gategroup, which your Ladyship
13 has had an opportunity to look at, I think you said-----
14 MRS JUSTICE BACON: Yes.
15 MS TOUBE: -- which is at Tab 19 of the authorities
16 bundle and at p.458 and it is para.183(3).
17 MRS JUSTICE BACON: Yes, that is the paragraph that I
18 looked at.
19 MS TOUBE: You will have seen, just further up in that
20 same paragraph, subpara.1:
21 "The Creditors' rights that fall to be considered are
22 both their existing rights against the company and the
23 rights conferred by the Scheme or the plan."
24 So again, that phrase is used.
25 MRS JUSTICE BACON: But if there are different

66

1 categories of rights against the company, such as common law
2 rights and statutory rights, which carry different
3 consequences, is that something that the court could
4 legitimately take into account?
5 MS TOUBE: It depends what the relevant alternative is.
6 So, if the relevant alternative is insolvency and whatever
7 the claims are are just unsecured claims which would be
8 provable in an insolvency, as they are here, then the fact
9 that some of them are in tort and some of them are in
10 statute does not make any difference at all. So the classic
11 difference would be between secured and unsecured Creditors.
12 MRS JUSTICE BACON: Yes, so, on insolvency, everyone's
13 rights will be the same because they are all unsecured, that
14 is your point?
15 MS TOUBE: Yes.
16 MRS JUSTICE BACON: I see. All right, I understand.
17 MS TOUBE: Again, I am not sure whether it is going to
18 take you much further forward, but just one of the other
19 cases that is in the bundle at Tab 20, which is the Re
20 Castle Trust Direct Plc [2021] 2 BCLC 523, which is the case
21 we normally look at to work out how to hold virtual
22 meetings. This is at p.471 of the bundle at para.38.
23 MRS JUSTICE BACON: Yes.
24 MS TOUBE: Here, Trower J is looking at the meaning of
25 the word, "meeting," and in that context, he says:

67

1 "It has to be construed in the
2 context of the purpose for which it's
3 used. The purposes is the mechanism by
4 which Creditors are able to come together
5 and consult with each other should they
6 choose to do so in order to make a
7 collective decision on the rearrangement
8 or compromise of their rights against the
9 company."
10 So, again, that is the classic terminology, "rights
11 against the company," and your Ladyship will have seen that
12 the reason for not proliferating classes is to avoid giving
13 a monology of veto. That is why we are looking at rights
14 and not Creditors. So, then I think it does make sense to
15 look at Apcoa, which we added at the end of the bundle at
16 Tab 33. I think that was sent over to my learned friends
17 separately, but I hope your Ladyship has it at the end of
18 your bundle.
19 MRS JUSTICE BACON: Well, let us see.
20 MS TOUBE: So, I was going to look at-- If you have
21 got p.814 in the bundle?
22 MRS JUSTICE BACON: Yes.
23 MS TOUBE: So, if you do, you will see paras.50 and 51.
24 This is Hildyard J in Apcoa, and you will see the heading,
25 "Distinguishing rights from interests," which I think was

68

1 the question that your Ladyship was asking me?
 2 MRS JUSTICE BACON: Yes.
 3 MS TOUBE: Can I just invite you just to look at
 4 paras.50 and 51?
 5 MRS JUSTICE BACON: Well, yes, but then he goes on and
 6 talks about interest in the sense of personal or extraneous
 7 interest, or subjective motivation, but that is not what we
 8 are dealing with here.
 9 MS TOUBE: No, but you will see what he deals— what he
 10 goes on to look at and this particular case is the Turnover
 11 Agreement, and you can see this— if we go back to p.817,
 12 this is at para.68.
 13 MRS JUSTICE BACON: Yes.
 14 MS TOUBE: You will see that Mr Snowden, who was
 15 counsel bearer, advanced various principal points in
 16 relation to class composition, and you will see that it
 17 related to the Turnover Agreement.
 18 MRS JUSTICE BACON: Yes, and then para.4, these
 19 differences of rights or, at the least, differences in
 20 interests proceeding from rights—
 21 MS TOUBE: Yes.
 22 MRS JUSTICE BACON: — and I think that is what is been
 23 said here.
 24 MS TOUBE: Yes, because what was trying to happen in
 25 that case was the right against a third party was trying to

69

1 be turned into a right against the company because the
 2 company was a party to the Turnover Agreement.
 3 MRS JUSTICE BACON: Yes.
 4 MS TOUBE: And the court then deals with the Turnover
 5 Agreement at paras.72 to 83, which starts at p.818 of the
 6 bundle, and I would invite your Ladyship to read this, but I
 7 should caveat it by saying, as the court says, it is not
 8 terribly clear what the Turnover Agreement actually was
 9 doing, but what was clear was that one set of Creditors has
 10 an obligation to turnover to another. So, if I could just
 11 ask you to look at paragraphs—
 12 MRS JUSTICE BACON: What, sorry, one set of Creditors?
 13 MS TOUBE: Had to turnover certain receipts to another.
 14 You will see this from paras.72 to 83.
 15 MRS JUSTICE BACON: Well, I cannot even begin to
 16 understand what is being said in those paragraphs, but—
 17 MS TOUBE: Well, the good news is that you do not
 18 really have to, because if we turn to para.90, which is on
 19 p.825 of the bundle, the judge reaches a similar sort of
 20 point to your Ladyship. He says, "I've no idea what this is
 21 really doing," but what it was not doing was affecting the
 22 rights against the company. If you look at paras.90 to 93.
 23 MRS JUSTICE BACON: All right, so the consenting
 24 lenders had to turnover to the SSFA lenders any rights which
 25 they got, and it is kind of the reverse of what is happening

70

1 here, they ended up with fewer rights?
 2 MS TOUBE: Yes, where they received something which
 3 actually belonged to another person, they had to pass it
 4 over—
 5 MRS JUSTICE BACON: Yes.
 6 MS TOUBE: — and what was being said was, well,
 7 because the companies are parties to this and because it is
 8 affecting what everybody is ultimately getting from the
 9 company, this is rights against the company, and the answer
 10 is no, this is something that is happening between the
 11 Creditors behind the curtain, as the judge puts it.
 12 MRS JUSTICE BACON: Where is that?
 13 MS TOUBE: You see in para.92, second line.
 14 MRS JUSTICE BACON: All right.
 15 MS TOUBE: So, there is a change of rights between two
 16 Creditors, but not a change of rights between the company,
 17 and that is the closest thing we can find to something which
 18 deals with non—rights against the company.
 19 MRS JUSTICE BACON: Yes.
 20 MS TOUBE: So, what are the cases that my learned
 21 friend relies on? Well, the first case that they rely on is
 22 Re Sunbird Business Services Limited [2020] EWHC 2860 (Ch).
 23 That is in my learned friends' authority bundle at Tab 6, p
 24 99.
 25 MRS JUSTICE BACON: Yes.

71

1 MS TOUBE: And my learned friends rely on what Snowden
 2 LJ said in para.23, and in particular that he talks about
 3 looking at the Scheme in the context of the restructuring as
 4 a whole. Now, of course, that is right; one does look at
 5 the Scheme in the context of a restructuring as a whole,
 6 including any rights conferred in other agreements, but
 7 these are still rights against the company, not rights
 8 against third parties. We can see that from Sunbird itself.
 9 If we go back to p.97 of the bundle at paras.11 to 14, we
 10 can see what the problem was in that case, and just to say,
 11 if your Ladyship reading all of that.
 12 MRS JUSTICE BACON: So, paragraph?
 13 MS TOUBE: 11 to 14. We had one Scheme Creditor, 21st
 14 Century, which had rights against another company, as well
 15 as the company, but that was not what gave it a different
 16 class statement. What happened was that the company had
 17 ended into a deed of novation, conditional on the new Scheme
 18 being sanctioned, under which the debt owed by that other
 19 company, SBSAL, was novated and assumed by the company and
 20 converted into shares in the company. So, what you had was
 21 rights against the company in virtue of the novation.
 22 MRS JUSTICE BACON: Yes.
 23 MS TOUBE: Now, those rights against the company were
 24 not being conferred under the Scheme, but they were being
 25 conferred under the deed of novation, which was part of the

72

1 wider restructuring so that that creditor got different
 2 rights out, and we can see that by para.14, the very end of
 3 that, that creditor was being offered a materially different
 4 and a more advantageous deal. So the rights are not all
 5 different. Yes, so it is in that context that the court is
 6 considering the question of wider rights, still rights
 7 against the company but outside the Scheme, and in para.24,
 8 which is, I think, at p.100 of the bundle, the court said
 9 that the deal of novation rights should be taken into
 10 account as well, and then in para.25 the court concluded
 11 that there was a material difference in rights out onto the
 12 Scheme – in other words, rights against the company – as a
 13 result of the wider restructuring.

14 Then the court goes on to consider, at paras.26 to 32,
 15 whether the class was fractured, and Snowden LJ said, no,
 16 commercial interests were aligned. You do not need to look
 17 at that, I think, because obviously all the case turns on
 18 its own facts, but Sunbird is not saying one looks at rights
 19 against the third parties. What it is saying is one looks
 20 at rights against the company, but outside the four corners
 21 of the Scheme. So, Sunbird does not take my learned friends
 22 anywhere.

23 Then we get to the other case upon which my learned
 24 friends rely, which is Cape, and they draw attention to the
 25 only relevant passages of that bundle, which is at p.13 of

73

1 the bundle, paras.23 to 26. So para.23 is the point that I
 2 was making to your Ladyship earlier, which is that Cape
 3 proposed that the Creditors should be divided into two
 4 classes, recall Scheme Creditors and general Scheme
 5 Creditors, and paras.24 and 25 explain why, and you will
 6 see, in particular, from the beginning of para.24 and the
 7 beginning of para.25, that the provisions of the Scheme
 8 distinguished those claimants for whom there was insurance
 9 cover from others.

10 MRS JUSTICE BACON: Yes.

11 MS TOUBE: So, in that case, they were different rights
 12 out under the Scheme, so it is perhaps unsurprising that
 13 those rights against the company and the other rights under
 14 the Scheme were treated differently. So, Cape does not
 15 assist my learned friends either, because that is a
 16 difference in rights out case.

17 MRS JUSTICE BACON: Yes.

18 MS TOUBE: So, that is why we say there is only one
 19 class. That is why we say the only rights are the rights
 20 against the company, anything else is interests, and that is
 21 why we say that there is no other reason for there to be two
 22 classes ordered. So, that is really all I had to say about
 23 class. Unless your Ladyship had any other questions, I was
 24 going to finish my submissions.

25 MRS JUSTICE BACON: No.

74

1 MS TOUBE: So, at para.85 of our skeleton we deal with
 2 the proposed directions. The timetable we set out in
 3 para.86, you will have seen my learned friends suggest that
 4 they would quite like that timetable to be pushed back.
 5 Obviously, it is a matter, really, for your Ladyship when
 6 the Scheme meeting should be held and when the sanction
 7 hearing should take place, but as I said earlier, our aim is
 8 to get this Scheme sanctioned and money out as soon as
 9 possible.

10 MRS JUSTICE BACON: Well, I think we will probably have
 11 to see where we are on Thursday morning for that.

12 MS TOUBE: Understood, and, effectively, I cannot say
 13 to a leadership that there is – unlike in some Scheme cases,
 14 there is no drop–dead date that this has to happen. It is
 15 just we would quite like Scheme Creditors to have an
 16 opportunity to vote and get money out as soon as possible.
 17 Paragraphs 88 to 90 deal with the virtual meetings point.
 18 Just to deal with one point there, again, it is a matter for
 19 your Ladyship, but my learned friends have suggested that we
 20 should also have a physical meeting because some Creditors
 21 may struggle with virtual meetings. We have proposed also
 22 that there should be telephone access, so those who do not
 23 have internet access should be able to phone in. The
 24 problem that we foresee with a physical meeting is that we
 25 would have to have a building that was big enough for

75

1 250,000 Scheme Creditors all to turn up should they so wish.

2 MRS JUSTICE BACON: Well, you are not going to have all
 3 of them turning up.

4 MS TOUBE: Well, yes, we would assume not, but if we
 5 had a place that was not big enough for all of them to fit
 6 in, that would be a problem. So we would rather not spend
 7 the Scheme Creditors' money on having a physical building
 8 either that nobody turns up to or is not big enough and
 9 everyone has to squash in, but again, if the court were to
 10 think that it is appropriate to have a physical meeting, we
 11 would have one.

12 MRS JUSTICE BACON: But what about a hybrid meeting?

13 MS TOUBE: Yes, sorry, that is what I had in mind.

14 MRS JUSTICE BACON: But are you proposing a hybrid
 15 meeting in any event?

16 MS TOUBE: No, we are proposing a virtual meeting.

17 MRS JUSTICE BACON: I see.

18 MS TOUBE: My learned friends are suggesting a hybrid
 19 meeting. We are saying the problem with a hybrid meeting is
 20 that we would not know how many of those people were going
 21 to turn up in person, so we would have to have a very, very
 22 large physical premises for those who were going to turn up.

23 MRS JUSTICE BACON: Yes. Well, you could do it hybrid
 24 with only those who submit a particular reason for needing a
 25 physical access to attend, as in somebody who simply is

76

1 unable to use a computer or telephone as you are proposing.
 2 MS TOUBE: Anything that makes practical sense we would
 3 be happy to do. We just are trying to avoid running up
 4 costs, obviously, so yes. We could certainly do that. The
 5 other question would be where that would be. So, if it is
 6 to be a physical building at all, it would make sense to
 7 have it in London.

8 MRS JUSTICE BACON: Well, perhaps in the short
 9 adjournment we might discuss with — I think it is Mr Bompas
 10 and Mr Pyatt — whether you can agree the terms for a hybrid
 11 meeting. I think it would be sensible to have some premises
 12 so that somebody who submits a specific reason for not being
 13 able to manage a virtual meeting can turn up, but I do not
 14 think that it needs to be somewhere with space for thousands
 15 of attendees.

16 MS TOUBE: Well, that is very helpful. We will
 17 certainly discuss that over the short adjournment. I was
 18 proposing to leave for now, until my learned friends have
 19 had an opportunity to look at the schedule, the methodology
 20 for voting and whether we can sort that out in a sensible
 21 way.

22 MRS JUSTICE BACON: Yes. Okay. And that is all the
 23 things on the schedule?

24 MS TOUBE: That is. There are a few things at the
 25 beginning of the schedule which just say we have cleaned up

77

1 the Scheme Creditor, but it is most of the stuff. Then,
 2 paras.92 to 98 deal with the explanatory statement, which
 3 you will have seen that the court needs to be satisfied. No
 4 point is taken on that by my learned friend, Mr Bompas, and
 5 his clients. I do not know if anyone else does. Then we
 6 deal at the end with a potential roadblock. We say that
 7 there is not one for various reasons. The only suggestion
 8 that is made, as I said, by my learned friends, is that the
 9 question of whether the reserve might run out. This is a
 10 point that is made in paras.38 to 42 of their skeleton.

11 MRS JUSTICE BACON: Yes.

12 MS TOUBE: We say, well, we make it clear what the
 13 minimum is and that there might not be a second
 14 distribution. So, it is difficult to see what further
 15 points we could make on that. We do not yet know by
 16 definition whether the reserve will or will not be exhausted
 17 and therefore whether there will or will not be a second
 18 payment. So, as long as we make it clear that there might
 19 be and it would be up to this, but we do not know yet, we
 20 think that that is clear.

21 MRS JUSTICE BACON: Well, can I just look and see what
 22 his objection is? You said it is at 41. Have you really
 23 answered that by saying, "Well, we do not know what claims
 24 will be made"?

25 MS TOUBE: Well— — —

78

1 MRS JUSTICE BACON: Because I think their point is,
 2 well, that reserve may not be big enough and what then
 3 happens if the reserve is exhausted?

4 MS TOUBE: Well, that was the point that I showed your
 5 Ladyship earlier, which is that if it got to a point where
 6 the reserve is exhausted and there are further claims made
 7 against the company and the company is put into liquidation,
 8 then we have put in place a mechanism for what happens to
 9 the Scheme Creditors in relation to payments out of the
 10 trust. So, there is a liquidation mechanism which we have
 11 built in.

12 MRS JUSTICE BACON: That is talking about WEIF
 13 liquidation, but this is making a different point, I think,
 14 about the reserve being exhausted. I am not sure your point
 15 about the WEIF liquidation addresses that.

16 MS TOUBE: Yes. What we're saying is that there are
 17 claims outside the Scheme. If the reserve is not sufficient
 18 to meet the facts for which it is supposed to meet, and if
 19 it is exceeded, so that there are then claims against the
 20 company, or alternatively, there are other claims against
 21 the company, and the company is put into liquidation, then
 22 we have set in place a mechanism for liquidation of
 23 effectively what is left, which is the settlement trust
 24 under the scheme. So the company would be put into
 25 liquidation. The trust would be distributed to the Scheme

79

1 Creditors.

2 MRS JUSTICE BACON: Are you saying there is no effect
 3 on the trust fund?

4 MS TOUBE: Yes.

5 MRS JUSTICE BACON: All right. So your position is,
 6 whatever happens to the reserve, which might in an extreme
 7 case result in the company being liquidated if the claims
 8 made against it exceed the reserve, that would not impact on
 9 the trust fund. Okay.

10 MS TOUBE: There is just one final point which I should
 11 have mentioned in relation to the explanatory statement. My
 12 learned friends wanted to say that they think it is adequate
 13 for now but want to reserve their rights to argue later if
 14 there is anything inadequate. That is a pretty high
 15 threshold, but the practice statement itself makes clear at
 16 para.15 that the adequacy of the explanatory statement can
 17 be raised again at the sanction hearing, so that is already
 18 dealt with in the practice statement.

19 MRS JUSTICE BACON: Well, it is and so there is no bar
 20 to them raising it again at the sanction hearing, but it
 21 seemed to me rather undesirable that if there is a point to
 22 be taken, that it should be held over to the sanction
 23 hearing, so I wondered. Yes. I am not very enthusiastic
 24 about everybody being here today, at no doubt vast expense,
 25 and then someone coming along and saying, "Well, we want to

80

1 have a bit more of a think about it." I mean, obviously if
2 there is something new that comes up between now and the
3 sanction hearing, that will be considered at a sanction
4 hearing, but if there is something that can be considered
5 now, I would like to consider it now.

6 MS TOUBE: Well, my Lady, we hear that, and that is a
7 matter for my learned friends. No doubt what will be said
8 is that they got the papers on Friday.

9 MRS JUSTICE BACON: All right.

10 MS TOUBE: So, my Lady, unless you have any further
11 points for me, I do not have any further submissions.

12 MRS JUSTICE BACON: No. Thank you very much. All
13 right. So, FCA.

14 SUBMISSIONS by Mr SMITH

15 MR SMITH: Thank you very much, my Lady. As my learned
16 friend mentions, the FCA supports the Scheme, my Lady. In
17 particular the FCA, considers that the Scheme offers Scheme
18 Creditors the best and quickest opportunity to obtain a
19 better outcome than the alternatives that are available, and
20 we think it is in Scheme Creditors interest that they be
21 given the chance to consider the Scheme and to vote on it.
22 My Lady, just by way of context for that petition — and your
23 Ladyship will have picked a lot of this up from the evidence
24 and skeleton arguments already — as your Ladyship will have
25 seen, in June 2019, the FCA notified the company that it was

81

1 commencing an investigation.

2 MRS JUSTICE BACON: Yes. Well, I have read all that,
3 so do you want to just pick up anything that is not in your
4 skeleton argument?

5 MR SMITH: Yes. Of course, so in that case, I mean,
6 unless your Ladyship has got any questions about the
7 restitution or anything, I am happy — from the FCA's
8 position, I am happy if they have to leave that as read.
9 Your Ladyship will obviously understand how that would work,
10 and the relevant alternative and so on and so forth. So,
11 unless your Ladyship has got any questions about that
12 process and the reasons why we have come to the view in
13 which we have, I think I can just get straight on to the
14 class point.

15 MRS JUSTICE BACON: Yes. I mean, I think the question
16 that I had earlier was about how the FSCS compensation
17 mechanism worked and whether that required a claim, a
18 separate claim, or whether that followed from the FCA
19 investigation. Do you have a position on that?

20 MR SMITH: Well, so far as that is concerned, there is
21 obviously a number of steps that would have to happen. So,
22 let us assume the Scheme did not take place, then the first
23 step is the FCA would have to go to the Regulatory Decisions
24 Committee. That would presumably take the decision to issue
25 the Warning Notice. Then, the company would have the

82

1 ability to go back to the Regulatory Decisions Committee to
2 make submissions too.

3 MRS JUSTICE BACON: Yes. Well, we have read all that
4 and it goes through and results in a decision by the upper
5 tribunal.

6 MR SMITH: Yes. So, let us assume we get to the
7 position where we have got an order at the s.384 from the
8 upper tribunal, then at that point that is something that we
9 consider could be presented to the FSCS by a claimant and
10 they could say, "Well, actually we have got this claim and
11 order in our favour. Please pay out on that." We don't see
12 any difficulty with that, but then it would be a matter then
13 for the FSCS to decide whether or not that claim was
14 compliant with the FSCS's own rules, and so far as we are
15 concerned that is a matter for the FSCS. They, I think as
16 can see from the correspondence, have not expressed a view
17 on that, and not taking the position on that at present.

18 MRS JUSTICE BACON: All right.

19 MR SMITH: So, unless your Ladyship has got any further
20 questions about the acquisition process and so on and so
21 forth, I will take that as read in the skeleton argument.

22 MRS JUSTICE BACON: Yes.

23 MR SMITH: So, my Lady, the only question I wanted to
24 address very quickly then is the question of class
25 composition. It is obviously a matter of the company

83

1 primarily to formulate the classes. Having said that, the
2 FCA, having looked at the arguments that have been put
3 forward on both sides, agrees with the position advanced by
4 the company. As your Ladyship noted, there are two aspects
5 to the class, and that is this question. You need to look
6 both at the existing rights, and also the rights which are
7 conferred by the Scheme. The focus, obviously, for the
8 present purpose is on the question of existing rights. We
9 agree with the company that that test is based on rights
10 against the Scheme company and not rights against third
11 parties, so we would agree that rights against the FCS,
12 which is a third party, fall out of the account for class
13 analysis purposes.

14 We would accept and indeed submit that they may well be
15 relevant for fairness purposes when you come to the sanction
16 hearing, and you are looking at the question of how
17 substantively the Scheme treats individual investors, but
18 they are not relevant, in our submission, for the purposes
19 of class analysis. My learned friend took you to a number
20 of cases. I am not going to go back to any of those. Your
21 Ladyship might just find it helpful to look at Hawk as well.
22 It's in the authorities bundle, tab 3, p.32. As your
23 Ladyship will know, this is the leading Court of Appeal
24 authority on the question of class analysis. If your
25 Ladyship goes to para.42, p.76, in the judgment of Chadwick

84

1 LJ, it is in our submission quite helpful to pick up what he
 2 said in para.42, and then is elaborated on paras.43 to 44.
 3 MRS JUSTICE BACON: Sorry. Which page of the bundle?
 4 MR SMITH: Page 76 of the bundle, para.42. Where he
 5 said this:
 6 "It is to my mind essential to have
 7 regard to the fact that the Scheme is
 8 proposed as an alternative to winding up.
 9 There's no doubt that the company is
 10 insolvent. It has presented a petition
 11 for winding up and the court has appointed
 12 a provisional liquidator. The right
 13 approach in those circumstances, it seems
 14 to me, is to consider the position on the
 15 basis of the relevant rights of those
 16 which the creditors would have in a
 17 winding up."
 18 Obviously, he means there a winding up of the Scheme
 19 company, as he then goes on to explain in paras.43 to 44.
 20 So, in my submission, it is quite clear that where the
 21 alternative to the Scheme is an insolvency proceeding, as it
 22 is in this case on the hypothesis that we would be
 23 successful in getting an order from the Upper Tribunal, then
 24 what you look at for the purposes of class analysis are the
 25 rights which the creditors have in that insolvency process

85

1 of the company. Then, he goes on to explain in 43 what
 2 those rights simply consist of, as simply the right to
 3 submit a proof of debt in the insolvency process. Then, he
 4 explained in that case why it meant that the different types
 5 of creditors all have the same rights. As he said in the
 6 penultimate sentence of para.44, "They have the same rights
 7 in a winding up." And again, that is obviously a winding up
 8 of the Scheme company.
 9 So, the first point, we agree with my learned friend
 10 that you leave out of the account for class purposes, not
 11 necessarily for fairness purposes, rights against third
 12 parties such as the FSCS. The other point where we agree
 13 with my learned friend is that, of course, looking at rights
 14 as against the company, the requirement for a single class
 15 is for the rights to be sufficiently similar, so the
 16 creditors in question consult together rather than
 17 necessarily be identical.
 18 Now, if we leave out of account the rights against the
 19 FSCS, such as they may be, and look at what the rights
 20 against the company would be, and the relevant alternative,
 21 for these purposes, one assumes that we would be successful
 22 in getting a restitution order upheld by the upper tribunal
 23 under s.384 of the Act. Under that order, all of the
 24 investors would be treated in the same way. So, to be
 25 clear, what we would be proposing in our application for a

86

1 restitution order is that the order for restitution would be
 2 in favour of all unit holders, and there would be no
 3 discrimination between them, and they would receive a
 4 pari-passu share of the restitution, relative to their units
 5 they held in the WEIM. So, under our right of action,
 6 everyone would have absolutely the same right.
 7 Now those investors may, in addition to that, have
 8 different rights against the company under s.138D or in
 9 tort, but as my learned friend said, those are all unsecured
 10 claims, and we know from cases like Hawk and Noble that
 11 certainly where insolvency is the comparator, that means
 12 that they have the same rights. But also here, you are
 13 looking at it in the context of the restitution order as
 14 well, where everyone will have exactly the same rights under
 15 the restitution order, and any other rights of action would
 16 inevitably have to give credit for what was received under
 17 the restitution order.
 18 So, you have really got the two points here. One is
 19 everyone has just got an unsecured claim, but also,
 20 actually, so far as the restitution order is concerned,
 21 everyone has exactly the same rights under that order in any
 22 event. So, my Lady, unless the FCA can assist your Ladyship
 23 any further, I think those are the only points we wanted to
 24 make.
 25 MRS JUSTICE BACON: Thank you very much, Mr Smith.

87

1 Yes, Miss Cooke.
 2 SUBMISSIONS by Miss COOKE
 3 MISS COOKE: Thank you. I am very grateful. I appear
 4 on behalf of Mr Joe Bannister, who has been engaged as the
 5 independent Investor Advocate in this case. It has been
 6 explained in the report and in my skeleton, but I think it
 7 is worth emphasising at the outset that the Investor
 8 Advocate is independent of the company and can reach of such
 9 conclusions as he sees fit in the issues within the scope of
 10 his role. And that role is, as your Ladyship will have seen
 11 in summary, to consider representations made by creditors in
 12 relation to the Scheme and also to engage any consumer
 13 bodies, and then produce reports for this convening hearing
 14 and for any sanction hearing in due course, and also of
 15 course to attend this hearing through counsel to assist the
 16 court as required.
 17 What I intend to do, and I am conscious the court has a
 18 lot to go through today, but what I intended to do briefly
 19 was just to outline the work that the Investor Advocate has
 20 done, and then look briefly at the key themes that have
 21 arisen from that work, obviously focusing on the issues that
 22 are relevant at the convening stage. I have been asked in
 23 particular by the Transparency Task Force to emphasise some
 24 particular points, so I will also do that.
 25 MRS JUSTICE BACON: How long do you need, because we

88

1 have got about five minutes before the lunch adjournment?
 2 MISS COOKE: Perhaps 15 minutes.
 3 MRS JUSTICE BACON: All right. So, if you want to
 4 start your submissions now, or would everybody prefer us to
 5 go through to the end of Miss Cooke's submissions, and then
 6 take a slightly later lunch? I am seeing some nods. All
 7 right. Well, I think if you can conclude your submissions
 8 in 15 minutes and then that is a much more natural stopping
 9 point, and then Mr Bompas can start afterwards.
 10 MISS COOKE: Yes. I am very happy to do that, subject
 11 potentially to coming back on the schedule, and I know we
 12 obviously have not had a chance to review yet.
 13 MRS JUSTICE BACON: No, no. Everyone will be able to
 14 do that.
 15 MISS COOKE: Yes. Thank you. I am grateful. In terms
 16 then of the work that the Investor Advocate has done, his
 17 role and his contact details were notified to creditors in
 18 the practice statement letter and also in the FAQs on the
 19 Scheme website and his role will also again be explained in
 20 the explanatory statement. What has been done so far really
 21 is replying to or dealing with correspondence received from
 22 creditors, and as at 4 p.m. on 2 October, which was the
 23 cut-off date we applied, just for the purposes of the report
 24 – we continued to correspond, of course, after that – but at
 25 that point, 97 emails from 86 sources had been reviewed and

89

1 responded to. That has been the bulk of the work that the
 2 Investor Advocate has undertaken. He has also, of course,
 3 engaged with the Transparency Task Force and reviewed the
 4 correspondence from Marcus Parker and Leigh Day, but I do
 5 not propose to say anything about that. My learned friend
 6 can address those issues raised by those investors.
 7 MRS JUSTICE BACON: Can you just explain a little bit
 8 about what the Transparency Task Force does? Unless you
 9 want to leave that for Mr Pyatt.
 10 MISS COOKE: Very briefly, it is an organisation,
 11 essentially with a mission to reform the financial sector.
 12 It has taken on scrutinising various situations, including
 13 this case, and it has taken an active role in considering
 14 this scheme proposal. Certain members of the task force or
 15 the task force leadership are investors in the scheme,
 16 including Mr Pyatt, so he will be able to provide some
 17 further information as to the role that the Transparency
 18 Task Force plays.
 19 MRS JUSTICE BACON: I see. So, part of the Investor
 20 Advocate's role is specifically to engage with that task
 21 force.
 22 MISS COOKE: Yes. To engage with consumer bodies and
 23 media bodies, and that is an example of that, yes.
 24 MRS JUSTICE BACON: Yes.
 25 MISS COOKE: The report, which is in the bundle at

90

1 p.987, sets out in quite some detail the contents of the
 2 communications that have been received.
 3 MRS JUSTICE BACON: I have read that.
 4 MISS COOKE: I am grateful for that indication. I do
 5 not propose to repeat everything. Some of it is obviously
 6 not relevant, at least at this point, though there are some
 7 points, though, that I think are worth emphasising, and they
 8 come under the five headings.
 9 The first is in relation to notice to Scheme Creditors.
 10 My learned friend, Ms Toube, has already picked up on Mr
 11 Bannister's view that reasonable efforts have been made to
 12 draw the existence of the scheme to Scheme Creditors. There
 13 are a few points that I think are worth drawing to the
 14 court's attention. The first is that eight emails have been
 15 received by the Investor Advocate with concerns that the
 16 price statement letter had not been received or were asking
 17 to be kept up to date. The Investor Advocate has obviously
 18 dealt with those, arranging for a hard copy, or directing to
 19 the scheme website as appropriate.
 20 A further point which the Transparency Task Force in
 21 particular emphasised, is a concern as to whether Scheme
 22 Creditors holding investments via platforms will have
 23 received the practice statement letter. The Investor
 24 Advocate raised this with Clifford Chance, the company
 25 solicitors, and understands that 98 platforms, brokers or

91

1 intermediaries will be contacted, as well as, of course, the
 2 advertisements that were being placed, but the Transparency
 3 Task Force remains concerned that what will have happened is
 4 that the notifications will have been sent to the
 5 intermediary accounts, and what they may have received is a
 6 standard document notification, rather than specific wording
 7 about what the communication is about.
 8 In those circumstances, the task force is concerned
 9 that perhaps the platforms have not passed on communications
 10 as proactively as may have been ideal, and that information
 11 has not been disbursed as widely as possible in terms of
 12 notifying the Scheme Creditors as a result. There is a
 13 concern that that may lead to an issue in relation to
 14 turnout. That is not an issue for today but is perhaps
 15 something that will become relevant in due course. So, that
 16 is what I was proposing to say about notification to
 17 creditors. In terms of the timetable, one communication has
 18 been received from an investor, suggesting that the time
 19 before the convening hearing has been inadequate, but there
 20 is only one communication in that regard.
 21 The second topic that I was going to mention is again
 22 around communication, but in relation to the return to
 23 creditors. This has I think now been addressed, but it is
 24 worth finding that 21 communications were received by the
 25 Investor Advocate about— or queries about the (inaudible)

92

1 of the payments they were going to receive. The
2 Transparency Task Force was also concerned about that, and
3 it is in response to that. Your Ladyship made the point
4 earlier that the Investor Advocate raised this with the
5 company, and the company has produced that worked example
6 that we went through earlier. A query been raised about why
7 that was not produced earlier.

8 The third point again really relates to the provision
9 of information. This is the point that the Transparency
10 Task Force wants to emphasise. In particular, they feel
11 that a thorough explanation as to what a restitution order
12 would look like, the likelihood of such an order being made
13 and the likelihood of the company contesting it has not been
14 provided. Those are matters that Ms Toube and Mr Smith both
15 provided some further clarification on this morning, but I
16 have been asked to emphasise that that is a concern to at
17 least some Scheme Creditors.

18 The fourth point is class composition. As the court is
19 aware, the company proposes a single class. The
20 communications received by the Investor Advocate in this
21 regard are summarised at para.2.3 of the report, and there
22 are, I think, three emails that the Investor Advocate has
23 received indicating that there should be more than one class
24 of Scheme Creditors in this case. It has been suggested
25 that those investors who fall below the compensation limit

93

1 of the FSCS should comprise one class, and those above that
2 limit should comprise another class. As well as those
3 emails, the TTF has raised a question as to whether retail
4 and institutional investors, on the basis that they have a
5 similar economic interest, should be in different classes.
6 Those represented by my learned friend, Mr Bompas, of course
7 raised this issue as to class, so I was not proposing to say
8 anything further because that issue is going to be fully
9 ventilated through the court.

10 The fifth issue then is in terms of the documentation.
11 The Investor Advocate has reviewed the Draft Explanatory
12 Statement and considers that sets out the purpose and impact
13 of the proposed Scheme in a reasonably clear and concise
14 way, and that he is generally satisfied that it includes the
15 information that the Scheme Creditor will need in order to
16 determine whether it is in their interest to vote in favour
17 of the Scheme. He has also, I should say, reviewed the FAQs
18 on the website as they have been updated, and is also
19 satisfied that they provide reasonably clear and considered
20 answers that should assist the Scheme Creditors. As we
21 mentioned before, those have been updated in response to Mr
22 Bannister's concerns.

23 There is a related issue around voting. There have
24 been some concerns expressed as to the lack of clarity as to
25 who is to be voting, in particular where investments have

94

1 been made by a platform, so I think that is something we
2 would need to come back to when we have reviewed the
3 schedule to see if that has been clarified. So, those were
4 the five themes really that come out of our report.

5 I think it is finally just worth flagging — perhaps not
6 strictly relevant at the convening hearing stage — but I do
7 draw the court's attention to the fact that we have received
8 a limited number of notifications as to how Scheme Creditors
9 intend to vote. One scheme creditor has raised a concern—
10 sorry, two Scheme Creditors have suggested they are going to
11 vote against the scheme. One raised a concern about the
12 fund's assets being used to defend claims against it, and
13 the FAQs on the website have been updated to clarify that
14 the fund's assets will not be used to fund the scheme. The
15 other has—

16 MRS JUSTICE BACON: The fund's assets won't, did you
17 say, be used?

18 MISS COOKE: Yes.

19 MRS JUSTICE BACON: Because that would be funded from
20 the reserve fund? So, what do you mean, "The fund's assets
21 will not be used to fund the scheme"?

22 MISS COOKE: The WIE—

23 MRS JUSTICE BACON: The WA—

24 MISS COOKE: Yes. Sorry.

25 MRS JUSTICE BACON: Okay. Yes.

95

1 MISS COOKE: Then the other email raises various
2 matters, including that the calculations provided have been
3 opaque, that the absence of engagement from the FSCS is
4 troubling, and the interests of creditors do not appear to
5 have been central to the process. Those are obviously
6 matters that individual investors may wish to take a view
7 on, and to take into account, but I simply draw those points
8 to the court's attention.

9 MRS JUSTICE BACON: I think you are right to say that
10 any decisions taken at the meeting will be a matter for the
11 sanction hearing, not the convening hearing.

12 MISS COOKE: Yes, exactly. Your Honour, on the other
13 hand, three creditors indicated to the investor that they
14 are likely to vote in favour of the Scheme. Issues as to
15 fairness are obviously not relevant at this stage. It is
16 fair to say that they have not been a theme in the
17 communications that we have received, but such issues have
18 been raised by Marcus Parker and Leigh Day, and so I will
19 leave those matters to them. Unless I can assist the court
20 further, that was all I was proposing to say. Mr Pyatt of
21 the Transparency Task Force does have some points to add,
22 but that may be after lunch.

23 MRS JUSTICE BACON: That will be after lunch, and can I
24 just suggest and indeed exhort Mr Pyatt and Mr Bompas to
25 liaise to ensure that there is not any duplication of

96

1 submissions. What I do not want to do is hear twice the
 2 same thing. All right, thank you very much. So, I will
 3 rise for the lunch adjournment, and we will then return, and
 4 we will hear from Mr Bompas first, then Mr Pyatt, and then
 5 on the remote link, Mr Allan and Mr Dickenson very briefly
 6 if they have got something to add, and I would just
 7 emphasise if they have got something to add that has not
 8 already been said. All right, thank you very much.
 9 (1.07 p.m.)
 10 (Adjourned for a short time)
 11 (2.12 p.m.)
 12 MRS JUSTICE BACON: Yes, Mr Bompas.
 13 SUBMISSIONS by Mr BOMPAS
 14 MR BOMPAS: My Lady, yes. Just to mention, there is
 15 still a problem with the audio, apparently, on the remote
 16 link, leave aside the visual at the moment. So far as the
 17 shorthand writer is concerned— the transcriber, I have
 18 mentioned it to Clifford Chance — I think it was Clifford
 19 Chance — and they say they are looking at it. So, what I
 20 would like just to do quickly is to explain where I think we
 21 are at. There is much common ground between the parties as
 22 to the applicable test on class and indeed on the applicable
 23 principles for the conduct of this hearing. You have got
 24 the skeleton arguments on that, good ample authority, and I
 25 will not waste time with what this hearing about. So far as

97

1 we are concerned, at the moment we are not opposing the
 2 Scheme. We are concerned to get the voting right, and we
 3 say there should be two class meetings. We are also
 4 concerned to make sure they are conducted efficiently, with
 5 Scheme Creditors being given a proper opportunity, and so
 6 that feeds into the clarity of explanations in the
 7 materials.
 8 Now, there is a point here that is worth stressing. My
 9 learned friend in her oral address to your Ladyship this
 10 morning explained that the settlement is with— of the— it
 11 has to be with the FCA — is of the underlying basis of the
 12 Scheme, that being the settlement of the FCA proceedings.
 13 That is how she said it, and that point is not just a
 14 throwaway. You can see it expressed by Clifford Chance in a
 15 correspondence on 3 October at p.1032 in the bundle.
 16 Paragraph 6, say Clifford Chance to us:
 17 "The scheme is being proposed in the
 18 context of a conditional settlement with
 19 the FCA and is not a settlement by
 20 reference to allegations of civil loss.
 21 We also note that under the FCA's
 22 methodology, all investors at the point of
 23 suspension of the WEIF, whether or not
 24 they are a private person, suffered the
 25 same loss and therefore should receive a

98

1 proportionate amount of the Settlement
 2 Fund."
 3 Now, that is highly important because as matters
 4 proceeded this morning, the comparator, if you like, what is
 5 the position of Scheme Creditors before and what is the
 6 position of Scheme Creditors after, the comparator has been
 7 presented as insolvent liquidation. That is not, in fact,
 8 how it is stated in the materials that have been presented
 9 to the court. The comparator is years. That is their word:
 10 years of litigation before anybody can receive a penny
 11 piece, and that is what will happen if the Scheme is not
 12 sanctioned. It may be that in some time in the future there
 13 is insolvent liquidation, but that is not what this company
 14 is offering. Indeed, the—
 15 MRS JUSTICE BACON: Well, I think what is being said is
 16 there would be an inevitable insolvency procedure because
 17 the amounts proposed in the FCA redress mechanism would be
 18 amounts that the company cannot pay and then there would be
 19 civil claims, which the company also could not pay.
 20 MR BOMPAS: Yes, but what the company is proposing to—
 21 remember the company is now a shell. It has no trading, no
 22 business. It just has cash. It is not suggesting there is
 23 going to be any return to the shareholders. It is just
 24 existing to distribute that cash to people who have been
 25 disappointed by the company's mismanagement, and so what the

99

1 company's doing, with the blessing of the FCA, is explaining
 2 how all that money is going to be frittered away in
 3 litigation —
 4 MRS JUSTICE BACON: Well, I do not think—
 5 MR BOMPAS: — as a comparator.
 6 MRS JUSTICE BACON: "Frittered away" is somewhat
 7 pejorative. What it is saying is that if there was
 8 litigation, that will necessarily drain the resources of the
 9 company because the litigation is going to have to be paid
 10 for somewhere.
 11 MR BOMPAS: And there will be litigation.
 12 MRS JUSTICE BACON: Yes.
 13 MR BOMPAS: But the end of the litigation is not
 14 necessarily insolvent liquidation.
 15 MRS JUSTICE BACON: Well, what is your—
 16 MR BOMPAS: It might be the company drifts on as a
 17 shell, but meanwhile my clients, if the litigation is
 18 successful, will have had, at the least, what will come from
 19 the FCA process and probably more if they succeed in their
 20 litigation and that will come from the FSCM— FSCF rather.
 21 MRS JUSTICE BACON: FSCS.
 22 MR BOMPAS: Yes, but in the process too it is worth
 23 remembering that what has been proposed by the FCA is that—
 24 sorry, there is no trace in the FCA's skeleton argument of
 25 the £50 million penalty that was mentioned in submission

100

1 this morning. That £50 million penalty, if there is no
2 scheme and if the FCA proceeds on its way, is highlighted in
3 several places in the documents as being material as a
4 consideration for investors to take into account when voting
5 on the Scheme, yet it was not mentioned by the FCA. You can
6 find it in the bundle at pp.142, 146, 1067 and 1119.

7 MRS JUSTICE BACON: There is no dispute. As I
8 understand it, the FCA has made clear that in the event of
9 the Scheme being approved, it will sacrifice the £50 million
10 penalty. It will not make that sacrifice if the Scheme is
11 not-----

12 MR BOMPAS: Precisely, but that is not stated by my
13 learned friend in the skeleton, and one would have to ask
14 oneself how realistic would it be for the FCA to pursue a
15 penalty against a company if the price of doing that would
16 be to deprive investors of recompense out of that same
17 defaulting company? But that point is not addressed. Now,
18 the FCA in the Scheme--- sorry, the FCA has been deeply
19 involved in the preparation of the Scheme. We know that.
20 Mr Midl, in para.128--- 29 of his witness statement, explains
21 the extensive engagement that the FCA had with the company.
22 It is also apparent from the Investor Committee report. We,
23 in contrast, have really very little engagement with the
24 company. The relevance of the FCA settlement, of course, is
25 that what it is doing is it is causing--- sorry, the FCA is

101

1 interested in making sure that investors in the Scheme who
2 had a loss get compensated under the compensation claim,
3 either--- without regard to the quality of their claims
4 against the company, provided only they were investors at
5 the time of the suspension. If they were not investors at
6 time of the suspension, there is nothing to come to them,
7 and that was the point that was debated in the end of the
8 submissions this morning. There is nothing that comes to
9 those people under the Scheme, and part of the reason for
10 that is that that class of person is obviously not viewed by
11 the FCA, or indeed by the company, as having any worthwhile
12 claim at all. So, what you actually have is the FCA
13 position, which is everybody who has invested in the
14 company--- sorry, in WEIF at the suspension date, whether or
15 not a private individual, should have compensation in their
16 restitution amount, and whether or not you have a good claim
17 or indifferent claim to have compensation-----

18 MRS JUSTICE BACON: Yes.

19 MR BOMPAS: And of course-----

20 MRS JUSTICE BACON: Everyone is treated the same.

21 MR BOMPAS: Everyone is treated the same, but that is
22 not actually how it would work in a liquidation because in a
23 liquidation, the creditors will be required to prove their
24 claims, and the company could perfectly well by the
25 liquidator dispute the quality of indifferent claims

102

1 compared to claims that are good. So, if you are a private
2 person with a 138D claim-----

3 MRS JUSTICE BACON: By the time of any liquidation, the
4 FCA would have adopted its decision, and there would
5 therefore be a liquidated claim or an ascertained claim, I
6 should say. In terms of the FCA redress, part of the return
7 at that stage, that would have been specified in the FCA
8 decision, as I understand it, and then there would be any
9 other claims that had been successful in the court.

10 MR BOMPAS: In the absence of a scheme, the liquidator
11 would be looking at the--- would be valuing claims in the
12 absence of a scheme, and it may be there is redress payments
13 directed, but it does not follow that a private investor
14 with a 138D claim is capped at the FCA restitution amount.

15 MRS JUSTICE BACON: No, because you would have--- I
16 think, as the company has recognised, over and above that,
17 you may have additional claims that you may bring.

18 MR BOMPAS: Precisely.

19 MRS JUSTICE BACON: Which may take your--- which may
20 result in individual investors having claims over and above
21 the FCA amount, which if not satisfied by the company in
22 liquidation, would then be brought to the FCFC (sic).

23 MR BOMPAS: If the company has gone into liquidation
24 because there has not been a circumstance in which other
25 folk interested in the company have supported it.

103

1 MRS JUSTICE BACON: Yes, I am just not sure where this
2 point is going.

3 MR BOMPAS: Well, where the point is going is because
4 it is going to come back to the question of class, and one
5 will see in the authorities, when I come to them, a question
6 of collateral agreement. As Clifford Chance have made
7 clear, what is happening here is the Scheme is being used as
8 a way of bringing into pass the FCA settlement with the
9 company, rather than having the company simply taking the
10 creditors and finding a way of distributing its assets
11 equitably amongst the creditors. Just again, my Lady, to
12 see the strength of the position, although the FCA do not---
13 it has not presented like this, if one compares the
14 explanatory statement at p.120 in the bundle--- at p.122.

15 MRS JUSTICE BACON: Just a minute. Sorry.

16 MR BOMPAS: So, one of the Warning Notice-----

17 MRS JUSTICE BACON: No, I am sorry. I am not even--- I
18 am not even vaguely there. I have lost my cursor.

19 MR BOMPAS: Sorry, I beg your pardon. It is the
20 hearing bundle p.120.

21 MRS JUSTICE BACON: Yes, I know. I have lost my
22 cursor. I cannot make any--- I cannot find it. Wait a
23 minute. All right. Which page?

24 MR BOMPAS: It is p.120. Now, the point that one gets
25 to in this paragraph--- sorry, para.2 and then para.4, is

104

1 that the FCA has, after investigation, issued a Warning
 2 Notice. That is not something that the FCA does lightly.
 3 It has done it after— it has taken that step after a
 4 genuine investigation of the merits of the position, and you
 5 can see what the conclusions are in summary in
 6 subpara.(a) to (d) and para.4. Our claims are explained a
 7 couple of pages further on at p.122. These are claims that
 8 have actually been brought, but other investors will be in a
 9 like position under 138D, and it is the same point, failing
 10 to meet liquidity properly, having a strategy change, which
 11 meant the fund became illiquid, taking steps to avoid the
 12 required tests for liquidity, overvaluing the assets and
 13 misbehaving. So-----
 14 MRS JUSTICE BACON: And how do those claims dovetail
 15 with the FCA restitution or redress procedure? Is it that
 16 insofar as you establish a claim that goes beyond what you
 17 get in the FCA redress procedure, you would get then the
 18 difference?
 19 MR BOMPAS: If the FCA's Warning Notice matures into a
 20 Final Notice with the same penalties, it was told to you
 21 this morning by Mr Bolton— by my learned friend, Mr Smith,
 22 that that would likely be a foundation under the FCSF (sic)
 23 — I am going to keep on getting it wrong— the compensation
 24 scheme for compensation. That is not how it has been
 25 explained in the papers, in the explanatory statement or in

105

1 the materials leading up to this hearing, and your Ladyship
 2 had to probe with my learned friend, Ms Toube, to find out
 3 actually what would be the outcome. The curiosity about
 4 this, it comes back to the position of both the FSA and the
 5 Scheme, the compensation scheme, if one looks again into the
 6 hearing bundle at p.1123, it starts— sorry, 1123. This is
 7 part of the Chairman's report, which your Ladyship may have
 8 seen. It is an annex, and what we have here is a response
 9 coming from the company to the Chair of the Committee. At
 10 para.4 on p.1124, the Committee start probing the question
 11 of the best available outcome for investors represented by
 12 the Committee, and the alternative is probed, para.(a), the
 13 comparator in other words, and then on the next page, 1125,
 14 under (b), "The Committee views the likelihood of the
 15 investors being eligible for (and receiving) compensation
 16 from the FSCS in any potential insolvency," and we want the
 17 company— "The company [please] provide; (i) a summary of
 18 its engagement with the FSCS, including any correspondence
 19 or other materials which relates to the likely availability
 20 of," and views and so on, and what one gets is the statement
 21 that: "LSFL [the company] has engaged with the FSCS for
 22 several months regarding the Scheme, and the treatment of
 23 Scheme Creditors. These discussions, and all correspondence
 24 are confidential. Accordingly, LFSL is not able to share
 25 copies of the correspondence."

106

1 So, behind the scenes there has been this dialogue
 2 about what is obviously a very important point for
 3 investors— private investors, and we are not told anything
 4 about it, other than we know that there will be no
 5 compensation if the Scheme goes ahead for those creditors
 6 who are subject to the Scheme, and that who knows what would
 7 happen if there is further pursuit of proceedings. Mr Smith
 8 has explained that if the FSC's (sic) Warning Notice turns
 9 into a Final Notice, then yes, there will be compensation
 10 most probably.
 11 MRS JUSTICE BACON: No, he did not say there would be.
 12 He said that there might be, and Ms Toube said the same
 13 thing.
 14 MR BOMPAS: Yes, but he highlighted the point that it
 15 is not dependent, compensation is not dependent, on civil
 16 claims being pursued by individuals.
 17 MRS JUSTICE BACON: No, he did not say it was not
 18 dependent. He said it might not be dependent, but that he
 19 is not speaking for the FCSC-----
 20 MR BOMPAS: Sorry.
 21 MRS JUSTICE BACON: And it would be for the FCSC to
 22 make a decision at the relevant time. I got a consistent
 23 answer from both Ms Toube and Mr Smith, was that it was
 24 possible that a claim under the FCSC compensation scheme
 25 could be based on the FCA final determination, but they

107

1 could not say that for sure, not least because they do not
 2 speak for the FCSC and a decision would have been made by the
 3 FCSC at the time, so that is the answer. It is not it will
 4 definitely be triggered by an FCA determination, but I am
 5 afraid none of that answers my question, which is how does
 6 the civil claim— how do the civil claims brought by your
 7 clients dovetail with the FCA decision—making process?
 8 MR BOMPAS: Okay, they dovetail to this extent that the
 9 Final Notice— sorry, if the Scheme goes ahead, it will be
 10 published, Final Notice. The Final Notice, the basis for
 11 the FCA's claim, as summarised in the explanatory document
 12 statement, has the same underlying facts as the generic
 13 claim form. That is to say the changes to the liquidity
 14 profile in the fund and the way in which that was addressed
 15 with the increasing illiquidity and, as a consequence,
 16 dissipation of the better-valued assets. So, it is the
 17 same-----
 18 MRS JUSTICE BACON: Yes, so the same.
 19 MR BOMPAS: — fundamental case.
 20 MRS JUSTICE BACON: So, what is the difference between
 21 the two, and in what circumstances would there be both?
 22 MR BOMPAS: In what circumstances would the civil
 23 proceedings follow on after a Warning Note, after a Final
 24 Notice? One would hope that it would not have to, but there
 25 may be further consideration of the quantum of claim for two

108

1 reasons. One, the FSC's claim is based on a slightly
 2 shorter period than the civil claim — the civil claim goes
 3 back to 2017; the FCA's goes back to 2018 — and the other is
 4 that there may be further claims in valuation as to the
 5 consequences of investors being locked into the fund. So,
 6 it was referred to this morning that my clients could be
 7 claiming as much as £300 million, and that is an indicator
 8 that the civil claims may actually be rather more valuable
 9 than simply the aggregate amount of compensation or
 10 restitution that the FSC thinks appropriate, and that of
 11 course then feeds on into what might be forthcoming from the
 12 compensation scheme. It is in this explanatory statement.
 13 It is para.125, which explains that if the Scheme goes
 14 ahead, the FCA will conclude its proceedings successfully,
 15 so far as it is concerned.

16 MRS JUSTICE BACON: So, you mean if the Scheme does not
 17 go ahead?

18 MR BOMPAS: No, if it does go ahead.

19 MRS JUSTICE BACON: Well, if the Scheme does go ahead,
 20 then the FCA will publish a decision, but it will not
 21 proceed to the stages of enforcement-----

22 MR BOMPAS: Correct. Correct.

23 MRS JUSTICE BACON: -- and penalty.

24 MR BOMPAS: Correct. The FCA's proceedings will have
 25 concluded with a win for the FSC-- the FCA rather, in terms

109

1 of having had a Final Notice, having established, if you
 2 like, its claim, its case, its contentions, but I come back
 3 to the point that, as we see it, what the Scheme is doing is
 4 not intending to deal with all links, unsecured creditors.
 5 It does not do that at all because it is only the Scheme
 6 Creditors, the investor creditors as a class who are dealt
 7 with, and even then it is only a part of them, leaving aside
 8 the pre-suspension date investors, and one can see that even
 9 in Mr Midl's statement comparing paras.136 and 182 — and
 10 they are pages, I think, 60 and 79 in the bundle — that the
 11 approach of the FSC's scheme for the two situations is
 12 different. One gets that-----

13 MRS JUSTICE BACON: Which paragraph of his statement do
 14 you want me to look at?

15 MR BOMPAS: Paragraph 21. It should be p.60.

16 MRS JUSTICE BACON: Paragraph 21, which is on page-----

17 MR BOMPAS: I think I must have got a misreference, my
 18 Lady. It is paras.136 and 182.

19 MRS JUSTICE BACON: Yes.

20 MR BOMPAS: The FCS's position is dealt with as regards
 21 to the Scheme Creditors at p.60, and then as regards the
 22 non-Scheme Creditors, it is dealt with at p.79. Where you
 23 see at para.182(c), it is expressed as a reasonable
 24 likelihood, para.182(c).

25 MRS JUSTICE BACON: What relevance does the existence

110

1 of pre-suspension investors have on the question of class
 2 composition?

3 MR BOMPAS: What relevance? It is this, my Lady: that
 4 one can see that the company, and for that matter the FSC,
 5 are prepared to divide up the company's investors into
 6 categories. There is the pre-suspension investors, and
 7 there is the post-suspension investors, and we suggest that
 8 there is actually a third-- the second category again splits
 9 into two. There are those who have the 138D claims, which
 10 are strong-- you know, they are good claims in insolvent
 11 liquidation or without a liquidation, and then there are the
 12 others, the institutions, whose claims are very much weaker
 13 and can be discounted.

14 MRS JUSTICE BACON: Why?

15 MR BOMPAS: Well, because they do not have the
 16 fortunate position that breaches of COLL give them a cause
 17 of action.

18 MRS JUSTICE BACON: Well, they have got other causes of
 19 action.

20 MR BOMPAS: Pardon?

21 MRS JUSTICE BACON: They have or might have other
 22 causes of action.

23 MR BOMPAS: But so far only I think a handful have been
 24 brought.

25 MRS JUSTICE BACON: But that does not make a difference

111

1 if they have got potential causes of action. They are all
 2 potential claimants who are all unsecured Creditors. Is
 3 there an authority which suggests that the strength of your
 4 cause of action-----

5 MR BOMPAS: I was going to come to the authorities-----

6 MRS JUSTICE BACON: All right.

7 MR BOMPAS: -- on the point.

8 MRS JUSTICE BACON: I mean, can you just answer that
 9 question, is there an authority suggesting that the strength
 10 of your cause of action should dictate fracturing of the
 11 class?

12 MR BOMPAS: I think the answer to that is yes-----

13 MRS JUSTICE BACON: Which one?

14 MR BOMPAS: -- and I think we will find it in Hawk, and
 15 it may be in another one which I am going to show you a
 16 little later, but can I come back to the order of events?

17 MRS JUSTICE BACON: Well, no, because you have just
 18 made a submission-----

19 MR BOMPAS: Okay.

20 MRS JUSTICE BACON: -- so I just wanted to understand
 21 that, because you made a submission that there are some good
 22 claims and some weaker claims. So I really wanted to
 23 understand how that fits?

24 MR BOMPAS: Okay, I think the point you can see in
 25 Noble, if I have got this right. Yes, it is Noble. The

112

1 case begins at p.238 in the bundle.
 2 MRS JUSTICE BACON: Yes, and which page?
 3 MR BOMPAS: The relevant passage is— well, it starts,
 4 actually, at para.84, where the judge is going on to deal
 5 with class, Snowden J, and the point at para.84 is the
 6 difference in his interests in motivations and rights. Then
 7 UDL, I think, is dealt with. Then he goes on down through
 8 to deal with Hawk at para.88, the usual point about
 9 discretion, and then in the context of a restructuring, it
 10 is established that:
 11 "Where a Scheme is proposed and
 12 alternative winding up an insolvent
 13 company, the relevant existing rights of
 14 those which Creditors are having a winding
 15 up see Hawk. In particular, as in Hawk,
 16 that means in relation to any proposals
 17 under a Scheme for determination and
 18 adjudication of Creditor claims against an
 19 insolvent company, the correct comparison
 20 is with the rights that Creditors would
 21 have under the statutory process for proof
 22 of debt in a liquidation."
 23 So, what is being acknowledged there is, in Hawk, you
 24 look at — and, in fact, in Hawk you can see it if you go to
 25 the report — how the particular types of Creditors —

113

1 insurance Creditors with contingent claims, Creditors with
 2 the crystallised claims — how their claims are dealt with
 3 outside the Scheme and then what is the provision the Scheme
 4 is going to make for the dealing with those claims. So you
 5 can actually have Creditors who have a different position
 6 before the Scheme and, likewise, then you can look at their
 7 position after the Scheme.
 8 MRS JUSTICE BACON: Is that because there might be
 9 secured and unsecured debts?
 10 MR BOMPAS: Well, that is one obvious distinction. In
 11 that particular case with Hawk it was not, it was insurance
 12 Creditors of different categories of insurance.
 13 MRS JUSTICE BACON: So they would be dealt with
 14 differently in any insolvency?
 15 MR BOMPAS: Absolutely. So, you can look at the before
 16 and after, as I think my learned friend Mr Smith submitted,
 17 but it does not mean that just because you are an unsecured
 18 Creditor, you are in the same bucket with every other
 19 unsecured Creditor.
 20 MRS JUSTICE BACON: Well, where is the authority that
 21 says that you are—
 22 MR BOMPAS: Sorry, can I just finish up on para.90?
 23 MRS JUSTICE BACON: Yes.
 24 MR BOMPAS: And then I must deal with your Ladyship's
 25 question. It does not follow that, simply because a Scheme

114

1 Creditor insolvency can restructure board litigation and all
 2 Creditors should simply be placed in a single class. On the
 3 basis of an argument, the Scheme proposed the only
 4 alternative to financial Armageddon of a liquidation.
 5 MRS JUSTICE BACON: Well, I have read the paragraph.
 6 MR BOMPAS: Paragraph 90?
 7 MRS JUSTICE BACON: Yes.
 8 MR BOMPAS: Oh, you have read the whole paragraph?
 9 Okay.
 10 MRS JUSTICE BACON: Yes.
 11 MR BOMPAS: And you get the point of the last bit about
 12 the solvent? Now, I have interrupted my Lady, I am sorry,
 13 forgive me.
 14 MRS JUSTICE BACON: No, no. So, I have read that
 15 paragraph, the question is still where is the authority
 16 which says that Creditors should be divided up or can
 17 legitimately be divided up according to whether they have
 18 got stronger or weaker claims?
 19 MR BOMPAS: Well, I was relying on that passage, and in
 20 particular on Hawk, they are different categories of
 21 insurance claim.
 22 MRS JUSTICE BACON: Which passage in this in this
 23 authority? It says—
 24 MR BOMPAS: Paragraph— Sorry, sorry. I thought I had
 25 got it out of para.89, my Lady, but—

115

1 MRS JUSTICE BACON: Well, yes, but that does not say
 2 that. It just says that the comparison with the rights that
 3 the Creditors would have under the statutory process for
 4 proof of debts and liquidation. What that does not say is
 5 that one therefore distinguishes between stronger and weaker
 6 claims.
 7 MR BOMPAS: No, but let us look at it like this, in our
 8 case, if the Scheme goes ahead, there will not be any
 9 process of proofing and solving liquidation. There will be
 10 distribution pro rata to a whole group of people, indeed,
 11 whether or not they made claims at all.
 12 MRS JUSTICE BACON: Yes, and if there is a liquidation
 13 process, then everyone will make their claims in
 14 liquidation, and they will all be unsecured Creditors?
 15 MR BOMPAS: Oh, precisely. If there is no Scheme and
 16 the company goes into insolvent liquidation, correct, but
 17 that process involves the liquidator reaching conclusions on
 18 the proofs of debts submitted. Just because I make a claim
 19 does not mean that the liquidator is going to admit me to
 20 proof of the full amount of my claim. I may have suffered a
 21 loss as a result of Link's failures, but that does not
 22 follow that I have a cause of action which is going to be
 23 acknowledged and considered to be worthwhile and
 24 recompensed, allowed as a proof of debt in a liquidation.
 25 MRS JUSTICE BACON: Well, how am I supposed to make a

116

1 decision on that now?
 2 MR BOMPAS: Well, let me put it like this, my Lady. My
 3 learned friend, I think, Mr Smith, conceded— he may not
 4 have conceded; he may have said it was a possibility, but
 5 certainly recognised that the position of the compensation
 6 as regards private investors was a consideration that could
 7 tend to fairness, and then that would be for the purposes of
 8 exercise of discretion at the next meeting, at the next
 9 hearing. Accepting that, one does ask the question
 10 rhetorically, why does the company so manifestly— has it
 11 set its face against having two classes, when the division
 12 is easy; it is not going to be the case that one could
 13 say—
 14 MRS JUSTICE BACON: Well, look, that is not—
 15 MR BOMPAS: — that they have a blocking minority in
 16 the private investors.
 17 MRS JUSTICE BACON: But the subjective motivation is
 18 not a question for me. The question for me is whether it is
 19 appropriate to have a single class because of the interests
 20 and rights of the Creditors and, in particular, looking at
 21 the rights of the Creditors against the company as opposed
 22 to the interest that they might have arising from rights
 23 against third parties.
 24 MR BOMPAS: I accept that, my Lady, but with this
 25 difference that I do want to show you authority for the

117

1 point that when one is looking at the question of the
 2 sanction to be given to a Scheme, outside arrangements do
 3 matter and can be attended to in the question of class
 4 consideration, and here we have outside arrangements between
 5 the FCA and the company, which are going to be carried into
 6 effect dependent on the Scheme. That is the settlement
 7 agreement, and the Scheme, as I started with this address,
 8 is concerned with the settlement. That is to say, the FCA's
 9 proceedings. That is the driver. Can I—
 10 MRS JUSTICE BACON: The outside arrangement that you
 11 are saying is relevant is the FCA settlement agreement?
 12 MR BOMPAS: Correct.
 13 MRS JUSTICE BACON: I do not understand that. I
 14 thought you said that the external arrangement that caused
 15 the difference was the existence of rights as against the
 16 FCSC.
 17 MR BOMPAS: Oh yes, absolutely. That is as a key
 18 factor when one is looking at the distinction between the
 19 private investors on the one hand, the private persons on
 20 the one hand, the 138D claimants on the one hand, and
 21 institutions and such like on the other. That is an
 22 integral part of their claims. They are investors who have
 23 this statutory position given to them as part of their
 24 investment rights, and those are to be given up, and as part
 25 of also that, the compensation scheme is released from any

118

1 prospect of further claims to make recovery on behalf of
 2 what it is had to pay out to such investors. That is the
 3 effect of the Scheme. Can I just show my Lady Sunbird,
 4 which was our authority's bundle, Tab 6, p.95. Yes. The
 5 paragraph I wanted to draw your Ladyship's attention to, you
 6 will have seen that the class composition tests, starting on
 7 p.99, para.18, all very familiar language, including
 8 para.21, it is about the solvent, the balancing factor of
 9 too many small classes, but lastly, para.23:
 10 "Finally and relevantly, for the
 11 instance case, modern authorities
 12 emphasise that in assessing how Creditors'
 13 class should be constituted"—
 14 MRS JUSTICE BACON: I have read the paragraph.
 15 MR BOMPAS: Paragraph 23 at the foot of p.99.
 16 MRS JUSTICE BACON: Yes. Yes.
 17 MR BOMPAS: Oh, I am sorry, my Lady.
 18 MRS JUSTICE BACON: No, it is all right. I have
 19 highlighted this already.
 20 MR BOMPAS: Okay, and then one can see—
 21 MRS JUSTICE BACON: But you have drawn my attention to
 22 that paragraph and so that says that:
 23 "The Scheme should be looked at in
 24 the context of the restructuring as a
 25 whole, including any rights conferred in

119

1 other agreements that are provided for
 2 under the terms of the Scheme."
 3 Are you saying that there are other agreements or under
 4 the Scheme there?
 5 MR BOMPAS: Well, your Ladyship has my submission about
 6 the landscape with the settlement agreement made with the
 7 FCA.
 8 MRS JUSTICE BACON: All right, but the FCA settlement
 9 agreement does not distinguish between your clients and
 10 other Creditors?
 11 MR BOMPAS: No, precisely, it does not, but what it
 12 does do is it deals with the position of the FSC, the
 13 compensation scheme, and also with my clients in the
 14 company.
 15 MRS JUSTICE BACON: Well, it does not deal with the
 16 FSFC compensation scheme. That is completely separate. The
 17 FCA will make a determination if the Scheme does not go
 18 ahead, and it will then proceed to enforcement action. It
 19 will not proceed to enforcement action if this Scheme is
 20 approved, but that does not—
 21 MR BOMPAS: But it is a necessary corollary of the
 22 release of the investors' claims. They have no further
 23 right under the FSCS Scheme.
 24 MRS JUSTICE BACON: Yes, but that is nothing to do with
 25 the FCA settlement. The FCA settlement puts money into the

120

1 Scheme, if you like, by sacrificing the £50 million penalty,
 2 but the FCA itself does not say anything about FCSC
 3 compensation that may or may not what be due, and that is
 4 what the FCA has made clear. It is a different entity.
 5 MR BOMPAS: Well, they are, except that the latter, the
 6 FSCS, lies under the responsibility of the FSC.
 7 MRS JUSTICE BACON: All right, but the FCA has said in
 8 turn that it is not making any submissions about the
 9 position of the FCSC, and it does not do that in the
 10 settlement arrangement either.
 11 MR BOMPAS: Well, my Lady, I do say that what we have
 12 investors who have a particular rights. They include rights
 13 that are valuable because they are rights against the
 14 company which if they are vindicated will produce or should
 15 produce compensation from the FSCS.
 16 MRS JUSTICE BACON: May produce.
 17 MR BOMPAS: I said should, my Lady, but may produce,
 18 right, and then the FSCS will continue to have a claim
 19 against the company. So the position of the FSCS and the
 20 rights or the ability of investors to have recourse to that
 21 is an integral part of their rights as investors which have
 22 been, we say— which give them the claims against the
 23 company and therefore rights against the company.
 24 MRS JUSTICE BACON: That is the point that you have
 25 made at para.29 of your skeleton argument, but that is not

121

1 an agreement that is provided for under the terms of the
 2 Scheme. The Scheme itself does not require any giving up or
 3 any sacrifice of FCSC recourse. It follows, as you say,
 4 simply as a corollary from the release of claims against the
 5 company.
 6 MR BOMPAS: Yes, but my point on Sunbird, and I think
 7 it is repeated— and I am going to show my Lady, if I may,
 8 another case, it is repeated elsewhere, is that when one is
 9 looking at the question of class, it is not right simply to
 10 look in an entirely narrow way on the individual investors
 11 and the institutional investors without also having regard
 12 to the fact that the position of the two as vis-à-vis their
 13 rights against the company, what happens if they are
 14 vindicated, is different. That is the simple point that I
 15 am submitting, and I think, my Lady, there was one that your
 16 Ladyship invited my own friend, Ms Toube, to deal with this
 17 morning. It looks as though the Scheme is intended to
 18 address a further position over and above, simply, the
 19 claims that any investor might have against the company for
 20 wrongdoing.
 21 MRS JUSTICE BACON: Sorry, and what is that further
 22 position?
 23 MR BOMPAS: The private investors' position as regards
 24 the FSCS.
 25 MRS JUSTICE BACON: Well, that is a knock-on effect

122

1 which Ms Toube does not deny, but she says that is a
 2 knock-on effect arising from a third-party claim not to
 3 right as against the company.
 4 MR BOMPAS: But my Lady-----
 5 MRS JUSTICE BACON: That was the relevance of the
 6 passage from UDL, which I asked her to address.
 7 MR BOMPAS: Yes.
 8 MRS JUSTICE BACON: And, actually, that was not a
 9 request only to Ms Toube, it was a request to you as well.
 10 MR BOMPAS: Right, and I was going to just actually
 11 pick up on exactly-----
 12 MRS JUSTICE BACON: Yes.
 13 MR BOMPAS: -- that point, if I might, very briefly,
 14 that the difference between the two is that, in the UDL
 15 case, whether you were an employee or not, you were a
 16 Creditor. An employee, putting the hat on the employee, had
 17 a different right that was distinct from the claim as a
 18 Creditor. In our case, the entitlement to compensation, the
 19 right to compensation, it springs from the very nature of
 20 the claims that one has to be able to start off bringing
 21 relief, claimant relief, under s.138D of the FSMA. You are
 22 a private person and as a consequence, you have particular
 23 rights of action and particular prospects of the company
 24 being subjected through the process of the FSCS machinery to
 25 claims that go on well-funded by the FSCS, while the private

123

1 person is compensated. So it is not, if you like, simply
 2 because you are an employee, it is actually because you have
 3 a claim of a particular character, a claim arising under
 4 s.138D. That is how I would seek to distinguish Lord
 5 Millett's exposition, as it is, however, on the facts of
 6 that particular case.
 7 MRS JUSTICE BACON: You are focusing on the words not
 8 deriving from any legal right against the company?
 9 MR BOMPAS: Sorry, my Lady, which paragraph are you
 10 referring to?
 11 MRS JUSTICE BACON: On p.186.
 12 MR BOMPAS: 186?
 13 MRS JUSTICE BACON: Of Lord Millett's judgment in UDL.
 14 MR BOMPAS: Oh, sorry, sorry, 186 in the-- No.
 15 MRS JUSTICE BACON: Am I right in thinking that your
 16 point is that in this case, the right to claim compensation
 17 from the FCSC derives from the legal right against the
 18 company, because it derives from, you say, the particular
 19 nature of the claim that your clients may be bringing?
 20 MR BOMPAS: Correct.
 21 MRS JUSTICE BACON: But then one runs into the problem
 22 that, actually, the claims that are made following an FCA
 23 final decision and enforcement process may also give rise to
 24 a claim from the FCSC.
 25 MR BOMPAS: What has actually not been explained, I do

124

1 not think, in the materials, and I cannot tell my Lady the
2 answer to this, is what actually is the right of action that
3 an individual would have if the determination were made by
4 the FSC that there should be restitution paid to the
5 individuals. I would expect, in principle, that the cause
6 of action would lie with the FSC to enforce that, which
7 rather suggests that the outcome of the FSC's process is not
8 a further and better cause of action lying on the part of
9 the individual, and that is a distinction between that
10 particular type of claim and the claim that the individuals
11 have under s.138D?

12 MRS JUSTICE BACON: No, I am afraid I did not follow
13 that submission.

14 MR BOMPAS: Well, we are looking at what the
15 individuals give up and what the individuals have— or,
16 sorry, what the investors have and the investors give up.
17 The proposition at the moment is that the investors have
18 claims against Link, and we say, yes, they do under 138D.

19 MRS JUSTICE BACON: Investors have claims against?

20 MR BOMPAS: Against the company.

21 MRS JUSTICE BACON: Yes.

22 MR BOMPAS: Thank you. We say they do; if they are a
23 private person, you have a 138D—type claim. The company
24 says and FSC recognise that other people, besides those,
25 have suffered loss, and that is where the FSC comes from

125

1 with its restitution payments, but what it does not follow
2 is that those other people have themselves causes of action,
3 or indeed, that they have causes of action to have the
4 compensation, the restitution amount paid to them if ordered
5 by the FSC. Their causes of action would remain the same,
6 both before and after the award from the FSC. So, in other
7 words, the FSC's position in ordering compensation is, if
8 you like, a potential burden for the company, but it is not
9 necessarily giving the investors a cause of action, so they
10 have no rights.

11 MRS JUSTICE BACON: Yes, so the FCA determination does
12 not affect any cause of action which individual investors
13 might have.

14 MR BOMPAS: Correct.

15 MRS JUSTICE BACON: And you say your clients will have
16 s.138D claims; institutional investors may have tortious
17 claims? Those will remain unaffected by the terms of the
18 regulatory action—

19 MR BOMPAS: Correct.

20 MRS JUSTICE BACON: — taken by the FCA. I understand
21 that, but going back to the UDL, what are you saying is the
22 relevant distinction?

23 MR BOMPAS: Well, I am submitting that the distinction
24 here, and it is one I know your Ladyship is considering, is
25 between a cause of action of one arising in one way and a

126

1 cause of action arising in another way. Typically, a
2 Creditor proving a liquidation has a debt. It may be an
3 employee has unpaid wages, and typically in a liquidation,
4 unless there is somebody who is given the right to prove
5 preferentially, unsecured Creditors are all in the same
6 class, but you have to prove your claim, and it may be that
7 some claims are better than others and are admitted to proof
8 and some are not. The character in our case of the claims
9 under 138D has a particular kind, and going with it, it has
10 also, I would say, the right, the prospect at any rate, of
11 compensation under the FSCS Scheme. So it is not—

12 MRS JUSTICE BACON: So, your point that a s.138D claim
13 carries with it the prospect of compensation under the
14 FSCS— I should start saying this the right way around, FSCS
15 Scheme, and other claims do not, but that is not what I have
16 heard from Ms Toube and Mr Smith, which in their submission,
17 one cannot say at this point what types of claim the FSCS
18 will admit, and the FSCS has specifically neither confirmed
19 nor denied. It simply says it will have to address it at
20 the time. So in terms of the decision that I am making now,
21 I cannot proceed on the basis that only s.138D claims will
22 be good ones in terms of sounding in FSCS compensation?

23 MR BOMPAS: Well, what your Ladyship has not been
24 helped with is the— I mean, it is in the papers plentifully
25 set out, but is that the requirement, effectively, to make a

127

1 claim for compensation is that you are a person, a private
2 person, a retail investor, call it what you like, the people
3 who will fall, and we would suggest, into the 138D category,
4 but if you are a platform, if you are Hargreaves Lansdown,
5 you are not going to be able to bring a claim for
6 compensation; you are simply not an eligible claimant.

7 MRS JUSTICE BACON: All right, but then the right to
8 bring a claim under the FSCS Scheme does not necessarily
9 turn on the question of whether you have got a particular
10 type of claim or not. It turns on your eligibility as a
11 particular kind of investor—

12 MR BOMPAS: Correct.

13 MRS JUSTICE BACON: — in that submission, but that
14 then does not derive from the type of claim that you have
15 got, whether it is 138D, or whether it is a tort claim, or
16 whether it is indeed, as Ms Toube and Mr Smith submitted, a
17 claim arising from the FCA determination. All of those
18 types of claim may ultimately lead to an FSCS compensation
19 claim, which turns on your character as an investor rather
20 than the type of claim you are making.

21 MR BOMPAS: Well, yes, but the simple proposition for
22 present purposes is that it can be assumed that if you are a
23 138D investor and you have your 138D claim, then you are
24 going to be eligible to have the compensation if you succeed
25 on your 138D claim?

128

1 MRS JUSTICE BACON: Yes, but the claim itself does not
 2 derive— your eligibility under the FSCS compensation scheme
 3 does not depend on you having a s.138D claim or otherwise.
 4 It depends on the type of investor you are. So that is my
 5 problem with the way in which it is framed in UDL, because
 6 there, the trigger for the additional payment was whether
 7 you were an employee or not. In this case, the trigger for
 8 an additional payment, at least on the materials before me,
 9 is not the type of claim that you bring as in the specific
 10 basis for the cause of action tort, or the FCA
 11 determination, or s.138D, but it is whether you fit within
 12 the eligibility categories under the FSCS compensation
 13 scheme.

14 MR BOMPAS: Well, when one has upwards of a quarter of
 15 a million claims, one can see that there are going to be
 16 people who would say they have different characters but,
 17 essentially, coming back to the facts of this case, there
 18 are in truth only two categories of claimant or investors.
 19 There are the retail private persons who actually, we would
 20 suggest, have their position as Creditors established or
 21 capable of being established under 138D, and in that way
 22 they have the right to compensation, so that it has to be
 23 looking at the matter in a very purist way to say, "Well,
 24 no. They are no different from any other unsecured Creditor
 25 investor into the WEIF Scheme." The reality is that you are

129

1 either going to be a 138D claimant, and with that you have
 2 the right to the compensation, or you are going to be
 3 somebody else. My Lady, if I can just draw your attention
 4 quickly to make some submissions on — I know time is
 5 pressing — the other authorities. You had——

6 MRS JUSTICE BACON: Can I just understand your
 7 position? Supposing one of your clients also had a tort
 8 claim, is it your submission that that tort claim falls
 9 outside an FSCS compensation claim? Also, if your
 10 client——

11 MR BOMPAS: It would not if it were vindicated, but it
 12 is not being brought.

13 MRS JUSTICE BACON: No. All right. Well, let me
 14 reframe that question another way then. Let us suppose one
 15 of your clients, following the failure of the Scheme to be
 16 approved, has a claim as found by the FCA in its redress
 17 mechanism. Are you saying that that would not entitle it to
 18 seek FSCS compensation if the company does not pay out?

19 MR BOMPAS: If one hypothesises that there has not been
 20 a judgment on the 138D claims and the compensation is
 21 directed by the FCA——

22 MRS JUSTICE BACON: FCA, yes. That is what——

23 MR BOMPAS: —then your Ladyship is right that there is
 24 the prospect, depending on how strongly Mr Smith puts the
 25 threshold, there is a prospect of compensation from the

130

1 FSCS.

2 MRS JUSTICE BACON: So, there would be. So, in that
 3 case there would be no s.138D claim, but there would be
 4 prospect of compensation?

5 MR BOMPAS: Well, sorry. No, no, no.

6 MRS JUSTICE BACON: All right.

7 MR BOMPAS: I simply hypothesised there had not yet
 8 been a 138D claim.

9 MRS JUSTICE BACON: All right, yes. That is my
 10 hypothesis. There had not been a 138D claim, maybe because
 11 your client decides it cannot do better than the FCA
 12 compensation. So, the compensation or redress is ordered.
 13 Company does not pay out, so it can then go to the FSCS.

14 MR BOMPAS: Sorry. I have muddled. I have muddled——

15 MRS JUSTICE BACON: Yes. No. We are all muddling the
 16 terms—— FSCS and get its claim. So, you accept that there
 17 is a prospect that it could do that?

18 MR BOMPAS: Yes. I mean, the question then would not
 19 be, "Have you established your 138D claim?" I accept that,
 20 my Lady, that what one would be looking at would be, in this
 21 hypothesis, a world in which the investors are given the
 22 choice and they may say, "Well, you know, I will just take
 23 the money and I will surrender any claim I might have under
 24 138D, and I will take what has been offered under the——
 25 effectively as a compromise of the restitution amount."

131

1 MRS JUSTICE BACON: Right. So, in that situation, how
 2 does the compensation claim from me under the FSCS derive
 3 from the right against the company being different from the
 4 right of the——

5 MR BOMPAS: I think, my Lady, your Ladyship is
 6 absolutely right. You make the point that the rules for
 7 compensation under the Scheme and the 138D threshold to the
 8 private person are not the same. That is to say that you
 9 can be, if one works to all the permutations under the
 10 rules, somebody who could qualify for compensation without
 11 having to have been a private person with a 138D claim as a
 12 consequence.

13 MRS JUSTICE BACON: Well, no. Okay. All right.

14 MR BOMPAS: But we submit that the reality is in the
 15 present case, there will not—— anybody who is going to get
 16 compensation is going to be also a private person who would
 17 be suing under 138, could sue under 138D.

18 MRS JUSTICE BACON: All right.

19 MR BOMPAS: Gategroup; I was going to run—— make some
 20 very brief points on their submissions of the case. You
 21 probably already have got the points.

22 MRS JUSTICE BACON: Are we talking about Gategroup
 23 at——

24 MR BOMPAS: Gategroup at 458. One has here the—— it
 25 is Zacaroli J setting out the test for composition. My Lady

132

1 has looked, I think, probably at already p.582, with the
 2 various propositions one is familiar with. The interesting
 3 point here is para.3.
 4 "Rights of the Creditors against
 5 third parties, for example, guarantors,
 6 will generally constitute interest, as
 7 opposed to rights, different in interest,
 8 maybe relevant."
 9 So, in other words, the learned judge has reserved
 10 himself the possibility that the general has exceptions.
 11 One then has the application of the test in this case at
 12 para.186 at the bottom of the page, and the comment is that
 13 the case is unusual, having looked at the comparator. The
 14 discussion on p.460 is quite prolonged. One can see though
 15 at para.193, the learned judge starts looking at the
 16 substance rather than the form. Then, the (inaudible) has a
 17 submission overleaf, p.406, about what unites and what
 18 divides.
 19 The learned judge has difficulty with that, and the
 20 conclusion is that in this particular case there should be
 21 different classes at p.208. Sorry. Para.208, on p.585.
 22 Now, what that — I suggest — shows is that it does not
 23 simply come out in the wash, that if you are a Creditor
 24 before and after, you are going to be somebody who should
 25 all be in the class with every other person who is a

1 Creditor. It is a case on the facts, of course.
 2 MRS JUSTICE BACON: Well, actually he is saying that
 3 the Creditor has had rights against completely different
 4 entities.
 5 MR BOMPAS: Yes, but that is after analysis of— and a
 6 quite careful scrutiny. We say, in our case the Creditors
 7 have rights against the company, yes, but they also have as
 8 part of their rights against the company the incident that
 9 they could force the company to end up confronting the FSCS
 10 on having had their compensation paid to them under the
 11 Scheme— sorry, under the compensation arrangements, under
 12 COMP, in the handbook. Cimolai, which is one I think was
 13 referred to in my learned friend's skeleton at para.71(3).
 14 Here, at p.488 is where the extract I think was. You will
 15 see the submission at para.51, which your Ladyship already
 16 looked at:
 17 "He accepts that is not unusual in a
 18 straightforward English Scheme or
 19 restructuring plan for Creditors with
 20 disputed and undisputed unsecured claims
 21 all governed by English law to be put in
 22 the same class where a formal English
 23 insolvency is the appropriate comparator."
 24 And the reason for that, my Lady, is because in the
 25 liquidation, they are going to be put in the— they are

1 going to be treated by the liquidator with attention to
 2 their claims in the process of proof. So, you then say, the
 3 conclusion is that in that situation they will all normally
 4 have the same essential decision to make at Scheme or plan
 5 meetings, and then you get the differences, the complication
 6 improving.
 7 With the— as at the top of the next page— formal
 8 insolvency, replacing what is being replaced by what goes
 9 under the Scheme. Then, the judge goes on:
 10 "... this is a fact-sensitive aspect
 11 of class constitution, because there will
 12 be contexts in which the nature of the
 13 dispute and the way it is to be litigated
 14 makes it impossible for consultation with
 15 a view to a common interest to occur with
 16 other unsecured Creditors. I am persuaded
 17 that, in the particular and relatively
 18 unusual context of this case, the impact
 19 of the approval of the restructuring plans
 20 on the conduct of litigation by the
 21 disputed derivative contract Creditors is
 22 just such a case. The factors which drive
 23 me to that conclusion are set in the
 24 context of the ability of other Creditors
 25 to challenge the admission to proof of the

1 derivative claims and, perhaps more
 2 importantly the fact that if the
 3 restructuring plan is approved, the
 4 planned companies themselves will continue
 5 to carry on their business in the ordinary
 6 way under the control of their existing
 7 management."
 8 So that's quite an interesting case on the facts, when
 9 we see a judge reaching the conclusion that actually there
 10 is a distinction between the categories of unsecured
 11 Creditors. I have referred— I have already showed my
 12 Ladyship Noble.
 13 MRS JUSTICE BACON: Can I just look at para.53?
 14 MR BOMPAS: Paragraph 53.
 15 MRS JUSTICE BACON:
 16 "...the unsecured Creditors will be
 17 focusing on the simple question of whether
 18 the proposed restructuring plans provide
 19 them with a better return than the
 20 relevant alternative, the litigating
 21 Creditors will also, and possibly
 22 exclusively be focusing on the impact of
 23 the restructuring plan on such matters as
 24 litigation tactics."
 25 How does that translate to this case?

1 MR BOMPAS: Well, we say that the crucial point,
2 actually, and almost the elephant in the room, is the
3 compensation, that if you're an institution, you have no
4 prospect of compensation. If you are a retail investor up
5 to £85,000, you have the prospect of your claim being made
6 whole. So, to imagine that the two types of Creditors can
7 work out what is better for them is really very difficult to
8 imagine. For the institutional investor, they get an amount
9 of money which they quite possibly would not otherwise get,
10 and it is all over. For the retail investor, they have the
11 possibility of saying, "Well, actually, you know what? I
12 want to see this company properly put into liquidation and
13 investigated."

14 MRS JUSTICE BACON: But there is no— I understood that
15 there is no doubt that if the Scheme is not approved, the
16 investigation is going to go ahead, so—

17 MR BOMPAS: No, no, no. Sorry. My Lady, if the Scheme
18 is approved, the FCA's warning notice will become a final
19 notice, but that is the end of any, if you like—

20 MRS JUSTICE BACON: Sorry. I must have misspoken: "If
21 the Scheme is not approved, the investigation will go
22 ahead." The FCA investigation and enforcement procedure will
23 go ahead.

24 MR BOMPAS: Correct.

25 MRS JUSTICE BACON: So, we are not focusing— so the

137

1 initial focus will be on that, and you have said that it may
2 be that that some of your clients will then pursue civil
3 claims, but in the first and foremost instance, what will
4 happen if the Scheme fails is that the FCA process will take
5 its course.

6 MR BOMPAS: Yes. There will be meanwhile, quite
7 possibly, the litigation pursuant going on, and then quite
8 possibly the company will be forced into insolvent
9 liquidation as part of that, and then quite possibly its
10 history will be looked at to see what other claims there are
11 in its insolvent liquidation.

12 MRS JUSTICE BACON: But this is not—

13 MR BOMPAS: The Scheme avoids that and all I was trying
14 to highlight was the distinction between an institutional
15 investor and the individuals, the private investors. They
16 are both, we suggest, in different boats, so that if you are
17 looking at the question, "Is there more that unites them
18 than divides them?" the answer is no. More divides them than
19 unites them. The other authority I thought I might deal
20 with was Apcoa. Yes. I think your Ladyship may have picked
21 this up this morning. In Apcoa, which is the last authority
22 in my learned friend's bundle, starts at p.798, and then
23 there is a p.815. In Hilliard J's discussion you see at
24 para.55, where after having referred to UDL and Alabama, New
25 Orleans, Texas and Pacific Junction Railway Co [1891] 1 Ch

138

1 213, the learned judge says:

2 "I say 'largely been dispelled' [that
3 is to say, confusion] because there remain
4 to my mind, some blurred boundaries,
5 especially as to what meaning is to be
6 given in the context to the term 'rights
7 against the company'."

8 And that is, I am afraid, the boundary that my Lady is
9 on in this case.

10 MRS JUSTICE BACON: Yes.

11 MR BOMPAS: The other point that I think, again, my
12 Lady may have picked up is at para.68, which begins on
13 p.817, where, at the foot of the page, there is the
14 difficulty with the comparator and the solvent of
15 insolvency, if you like, as a solution to any difficulty.
16 The learned judge says that actually, there is more to it
17 than that. My Lady, I fear that if I continue, I will be
18 repeating myself. We say that in this case, there is
19 actually— there are two classes, and there should be two
20 class meetings. I was very surprised, given the way in
21 which the company explained its urgency, to learn that if
22 two class meetings are directed, the company has it in mind
23 to appeal. That was odd. One would think that if there are
24 two class meetings, they would just want to get on with it.

25 MRS JUSTICE BACON: Yes. Well, it is 25 past 3, so we

139

1 have been going for a bit more than an hour. I think that I
2 will take five minutes and then if there are any sweep-up
3 points that you want to make—

4 MR BOMPAS: I will try and make sure that they are very
5 few.

6 MRS JUSTICE BACON: Yes. All right. Thank you very
7 much.

8 (3.23 p.m.)

9 (Short break)

10 (3.34 p.m.)

11 MR BOMPAS: My Lady, I will be very brief.

12 MRS JUSTICE BACON: The video is now up and running, so
13 I will be able to have submissions from the two investors on
14 the video link.

15 MR BOMPAS: Right, and I will let that happen as soon
16 as would be practical, which should be momentarily. On the
17 voting form that was handed up this morning, and we saw for
18 the first time, I am told that it is a very considerable
19 improvement on what was in the materials before the court as
20 of nine o'clock this morning, that likely it is something
21 that we for our part will be able to agree, but what we
22 think is that there should actually be a bit of discussion
23 amongst those represented today to settle that.

24 Likewise, with the question of virtual meetings, there
25 has been discussion as to the possibility of having a hybrid

140

1 meeting of some sort. I think it has been contemplated that
2 the meeting room could likely be provided by one of the
3 firms of solicitors, that it is unlikely to need to be very
4 large. I mean, it is not— we are not talking about Wembley
5 Stadium.

6 MRS JUSTICE BACON: No. That is what I had in mind: a
7 reasonable size meeting room, but yes. It is not going to
8 need to accommodate thousands.

9 MR BOMPAS: No. The parties are having a discussion
10 about that, so that should be capable of being resolved.
11 Then, there is a question of timing. In our skeleton, I
12 think we referred you to a case of Indah Kiat — it is at
13 para.43 — on a question of timing. That is actually quite
14 an interesting case, if my Lady has the opportunity to look
15 at it. It starts in our bundle at p.43, then goes on to
16 p.45.

17 MRS JUSTICE BACON: Can you please tell me what
18 paragraph of your skeleton argument?

19 MR BOMPAS: In our skeleton, it is referred to at
20 para.43 on p.12, Indah Kiat, and the question is, really,
21 the timing of the meetings and the next hearing. In that
22 particular case, the learned judge actually adjourned the
23 convening hearing, considering that there were matters that
24 needed to be got straight in terms of actually addressing
25 creditor position. I am not inviting my Lady to adjourn any

141

1 further this hearing. What one would hope is that, with
2 several days, let us say five working days, the parties
3 should have been able to sort out the question of
4 communication voting, and that could go into the form of
5 order that we had made on your Ladyship's judgment.

6 MRS JUSTICE BACON: Can that not be sorted out between
7 now and Thursday?

8 MR BOMPAS: Well, we could try. That is about the best
9 I can say, but we do not see myself— we do not see for our
10 part that the time for having the meetings — meetings or
11 meeting, depending on your Ladyship's ruling — and the time
12 for the hearing is actually realistic. We would suggest
13 that the truth is the timetable needs to be revisited, with
14 longer for the meetings and then, naturally, a follow-up
15 probably early New Year for the sanction hearing. Then, the
16 final point to mention is the Explanatory Statement. We
17 only saw the detailed documents, the rules and the
18 Explanatory Statement late on Friday evening, and I have to
19 say that I cannot, as I stand here, say that we will have no
20 comment or criticism of it when it comes to be circulated.
21 At the moment, all I can say is I cannot envisage anything,
22 but I cannot promise that we are bound by that when it comes
23 to the sanction hearing.

24 MRS JUSTICE BACON: Did you see a draft Explanatory
25 Statement before then, or is that the first ———

142

1 MR BOMPAS: No, no, no, no. We did not———

2 MRS JUSTICE BACON: That is the first you have seen?

3 MR BOMPAS: That was the first we saw of it. I mean,
4 others have seen it, but not us.

5 MR PYATT(?): George, it was on Thursday.

6 MR BOMPAS: Thursday. I am sorry, I am corrected,
7 Thursday evening. So, we did our skeleton argument having
8 had it but, naturally, it has been very rushed.

9 MRS JUSTICE BACON: So, you saw this for the first time
10 on Thursday evening?

11 MR BOMPAS: Thursday evening, my Lady, and what is
12 disheartening is that I showed my Lady the paragraph in Mr
13 Midl's witness statement, I think it is para.129, which
14 showed how much interaction there had been with the FCA,
15 say, about the documents for the court.

16 MRS JUSTICE BACON: Did none of your clients have
17 discussions with the Investor Advocate about the draft
18 Explanatory Statement?

19 MR BOMPAS: One of our clients is—— The answer to that
20 is no, but what we do know is that this was being discussed
21 with the Investor Committee, but one of our clients, who is
22 also on that committee, cannot reveal to us confidential
23 information on the Committee. So we would not get—— from
24 the ninth member of the Committee, we would not have had a
25 back door into the Explanatory Statement, so until Thursday

143

1 all we had was the practice statement letter.

2 MRS JUSTICE BACON: But is this—— Again, is this not
3 something that can be sorted out on Thursday at the
4 consequential hearing? Because you will have a full day
5 tomorrow for all of you to look at the voting form and the
6 Explanatory Statement.

7 MR BOMPAS: Well, we will certainly do our best, my
8 Lady, of course, but it means identifying points and then
9 inviting Clifford Chance to amend the Explanatory Statement,
10 and if they do not agree, well, they do not agree.

11 MRS JUSTICE BACON: All right. I mean, of course,
12 nothing prevents you from raising this at the sanction
13 hearing, but it seems to me that, by Thursday, you will have
14 had almost a week to look at it, so if there are obvious
15 points, I would expect them to be raised then.

16 MR BOMPAS: My Lady, I have heard what you have said
17 and, of course, if my Lady's decision is that there should
18 be two meetings, then that will need to be factored into the
19 drafting.

20 MRS JUSTICE BACON: Yes. All right, thank you very
21 much. So, is that your sweep-up submissions, then, Mr
22 Bompas?

23 MR BOMPAS: Correct, my Lady.

24 MRS JUSTICE BACON: Thank you very much. So, that is
25 the submissions from the claiming investors, so I will now

144

1 hear submissions from Mr Pyatt. Am I pronouncing your name
2 correctly?

3 SUBMISSIONS by Mr PYATT

4 MR PYATT: That's correct, my Lady. So, first of all,
5 thank you. I'm obliged to be here. I'm a private investor
6 at WEIF. I was there for one year. I am a member of the
7 Transparency Task Force. I am one of the leaders of the
8 Committee for the Woodford Claim that we have. I'm
9 representing those people. I'm also representing anybody
10 else who's contacted me. I'm also representing any private
11 investor or retail investor who hasn't had a clue what's
12 going on, which if I had a pound for every person— I'm
13 already retired, but I'd have a lot of money in my pocket.
14 I want to present things that are factual. My learned
15 friends in front of me have all run the legal side of it;
16 I'm looking at it from a perspective of fairness, fairness
17 of process and fairness for the investor, whoever the
18 investor is, and the cornerstone of any decision that any
19 investor will make is they must have good information to
20 provide to them to be able to make a decision— a sensible
21 decision.

22 MRS JUSTICE BACON: So, your submissions are going to—
23 are they focusing on process?

24 MR PYATT: Well, process, communication, basically, and
25 to put some real numbers in it, because there's been numbers

1 banded around that are too similar and it can be confusing
2 for people listening here, (inaudible).

3 MRS JUSTICE BACON: All right. Just before you embark
4 on those submissions, how long do you need? Because I have
5 also got to hear, I think, two other investors.

6 MR PYATT: I would hope— 10 minutes, hopefully. I
7 will be quite quick.

8 MRS JUSTICE BACON: Very good. Thank you very much.

9 MR PYATT: I had a conversation and talked about three
10 Cs: communication, classes, which has sort of been covered,
11 and the counterfactual. First off, to just talk at
12 lunchtime, I found out how the magic number of 298 came from
13 the FCA, and it's to do with seven months of sales of shares
14 before the break-up, and how much we would have been
15 disadvantaged, and that's how they got to 298.
16 Unfortunately, it's not been challenged. It's been used by
17 the company to say, "Well, we've given you 230, or 180 if we
18 take 50 out, which may be used elsewhere," and then the FCA
19 are saying 298. Well, the number's nothing like that.
20 It's— You know, since the closure, when they closed it,
21 Link said, "We have closed this to protect the investors,"
22 and since then, they've lost nearly a billion pounds. If
23 that's protecting investors, then we've got problems in this
24 country from that side of things.

25 If we look at communications, the Investor Advocate to

1 my right, here, has only had 97 emails bar mine. If there's
2 250,000 investors or 300,000 investors, that means a lot of
3 people don't know what's going on, haven't seen it. Then,
4 we come to the communications. Unfortunately, the
5 communications that went to the platforms said, "Please
6 issue this letter to your clients." Some of them sent
7 emails to— Most of them sent them to their portal, so if
8 you go into your portal where you've got your investments,
9 you'll see you'll have a new message. Some people got an
10 email from a platform that said, "You have a new document,"
11 and that's all it said, so it didn't tell them, "It's
12 important, you should look at it," etc., etc., and that
13 can't continue with this vote, and I'll come on to that vote
14 later on. I mean, they should have used better wording.
15 Rather than issue, they should have said direct
16 communications, so that was a failing by them.

17 Then we look at the numbers. I was informed by the
18 Investor Advocate that, by the end of September, only 90,000
19 people downloaded the PSL. That's less than 10 per cent of
20 the 220,000 that they said they'd found, which isn't very
21 good. Then, if we look at the statements from Clifford
22 Chance, that the company has got to 90 per cent of the net
23 asset value and 220,000 investors. If we look at the
24 company Hargreaves Lansdown, they are one-third of that net
25 asset value, and 60 per cent of the investors they found are

1 on one platform. So, we should be able to do much better
2 for communications.

3 MRS JUSTICE BACON: Have you got specific suggestions
4 that you want to make?

5 MR PYATT: Yes. I'd like the company to make— So,
6 the company here does not know who their investors are.
7 They may know about 1,000 to 2,000, whatever the number is,
8 but the majority of investors are held with platforms and
9 intermediaries. They really should have got an Access or
10 SQL or whatever database and said to all these people,
11 "Please tell us who your investors are." Of course, the
12 platforms have to go to the investors and say, "Through
13 GDPR, can we release your details?"

14 MRS JUSTICE BACON: Is that practical for that process
15 to be carried out? Can whoever it is who is not muted
16 please mute themselves. Anybody who is dialed in, please
17 mute yourself. No exceptions, please. Thank you.

18 MR PYATT: It has to be direct communications, and if
19 it takes time. If it took a month, so what? You know, we
20 waited four and a half— well, four and a quarter years for
21 this to get to where it's got to. Most investors, a lot of
22 investors, are just blasé about it. They've either written
23 it off or they can't be bothered. It's just been so long in
24 the tooth they've just given up. The other thing is the
25 investors who don't know this is going on don't realise that

1 if the vote goes ahead and the Scheme is approved by the
 2 vote and by the court, then it will be binding on every
 3 creditor who holds WEIF shares after the closure date. So,
 4 if you're going to get 4p or 6p or 5p in the pound, then
 5 that's what you're going to get, and it's just done to you,
 6 so we've really got to get out there to the investors. If
 7 there's 250,000, we need to get to them.

8 MRS JUSTICE BACON: So, are you saying that what they
 9 need to do is ask all of the platforms to provide them with
 10 a list of the contact details for all of the investors, and
 11 those should then be contacted directly by the company?

12 MR PYATT: Yes.

13 MRS JUSTICE BACON: By post or email?

14 MR PYATT: Both. Well, it depends. If they've got
 15 email, by email, or by post if they haven't got emails. The
 16 majority of people who've got platforms will have an
 17 account, which means they will have an email. People,
 18 through intermediaries, may have just done it via post or
 19 whatever, especially the older investors. I also want to
 20 talk about WEIF. Why did I, and why did hundreds of
 21 thousands of other people, invest in the Woodford Equity
 22 Fund? It was a retail fund, as defined by the FCA, which
 23 meant it holds stocks, shares — same thing — bonds and some
 24 are liquid stocks. We know there's a risk, but towards the
 25 end — not even towards the end, before it closed, it went

1 well away from that. Other people knew about this, not in
 2 this room, but in different institutions, and did nothing
 3 about it, hence the losses are so great, if you go back four
 4 years, we're nearly at a level of two to three billion
 5 pounds of (inaudible) losses. Some are due to selling of
 6 shares — I mean, when they closed the fund, it took so long
 7 that they decided to do a fire sale of all the quoted stock
 8 and, of course, most of those quoted stocks went down in
 9 value because people knew there was going to be a run on
 10 those shareholdings.

11 MRS JUSTICE BACON: The reasons why the fund failed are
 12 not a matter for me today.

13 MR PYATT: No, okay, yes, thanks for that. Restitution
 14 order, there's been three mentions of restitution order in
 15 front of me here. As a private investor, another private
 16 investor, we want the FCA to take the company — not to the
 17 cleaners, but to look back beyond the closure of the fund.
 18 So, this Scheme is only looking at the front for four years
 19 since the Scheme. It should be looking at the four/five
 20 years before the Scheme, because the losses on both sides of
 21 that closure were the same. So, if this fails, then the FCA
 22 could do a restitution order for both pre and post, as my
 23 learned friend had spoken in front of us.

24 Another number that came up this morning was said about
 25 Leigh Day and Marcus Parker, and that they've got about

1 11,000 investors, which — the claim is 300 million. They've
 2 actually got 20,000 investors, so that number's more like
 3 500 million, so that's a significant sum. Right, the voting
 4 form. Unfortunately, I've not seen the voting form, I've
 5 only heard about it third-hand, and from what I gather — and
 6 there's going to be a meeting about it — if this form has to
 7 be dragged down from a website, only 19,000 people have been
 8 and downloaded the PSL. That isn't going to go to a lot of
 9 people, and by the way, there are 24,000 people with lawyer
 10 firms, such as Leigh Day, Marcus Parker and RGL. I suspect
 11 the majority of those went to the site and downloaded the
 12 PSL. So, outside of those numbers, there aren't that many
 13 people being involved in the process.

14 I would ask my Lady that, when the voting actually does
 15 come in, if this goes forward, that we look at the
 16 statistics of who voted from which class — if we have two
 17 classes, which I (inaudible) do, how much the votes were
 18 from both sides of the house. The only thing I'd like to
 19 say about classes is there is a definite economic interest
 20 difference between myself and an institution. I have
 21 access, hopefully, to the financial conduct services Scheme,
 22 retail — sorry, the (inaudible) investors do not.

23 Next, I'd like to come on to the platforms, those
 24 lovely platforms. If you're a private investor or a retail
 25 investor, you can have direct shares in WEIF, or you can be

1 in what's called a multi-manager fund, a fund where Woodford
 2 shares or Link shares are part of an overarching product,
 3 and it's been termed in the document as being the, "First
 4 fund," so the first fund gets to vote. Now, in financial
 5 circles, there's something called a DFM. So, a DFM is an
 6 individual or a company who manages your portfolio on your
 7 behalf, so if they want to buy shares here, there and
 8 everywhere, they just do it, they don't actually ask you to
 9 do it, but for this, it's going to affect nearly a quarter
 10 of a million people. Those platforms or those MMS should go
 11 back to the investors to litmus test them, to see whether
 12 they thought this or not, and not just arbitrarily take the
 13 vote away from them and say, "We're going to do this." I've
 14 had instances — and I think it's been already mentioned —
 15 regarding a particular company who just said, "We'll do it
 16 on your best interests. We'll make a decision for you,"
 17 which is unfair for investors.

18 Lastly, it's been quite opening today about the
 19 Investor Advocate's role and the FCA. From an investor
 20 perspective, a private, retail investor perspective, we
 21 thought the Investor Advocate was there as a champion for
 22 the investor, and the FCA definitely should be the champion
 23 for the investor. Unfortunately, there's been a — I
 24 wouldn't call it a marriage but a relationship — maybe
 25 physical or not, I don't know — has been taking place, and

1 it's all behind closed doors. It's all confidential. We'll
 2 just hush it up. Neither the company nor the FCA want this
 3 to go to litigation. They are desperate to get this through
 4 the vote. I've put here, "Single share class, why, why,
 5 why?" Now, I know, my Lady, you said it's not really for me
 6 to know why, why, why, but they're fighting it so hard,
 7 there must be a specific reason they know they have to do
 8 this to get it through. I think that's me over for now.
 9 MRS JUSTICE BACON: Thank you very much.
 10 MR PYATT: Thank you very much. That took 10 minutes.
 11 That was good timing.
 12 MRS JUSTICE BACON: Thank you very much for your
 13 concise submissions and your written submissions. Can I now
 14 just check, has Mr Pyatt's written submission been
 15 circulated to everyone?
 16 MS TOUBE: Yes, my Lady.
 17 MRS JUSTICE BACON: All right. What about Mr Pyatt's
 18 concern that he hasn't seen the voting form? He has now
 19 been sent a copy of the skeleton arguments that he didn't
 20 have, and the hearing bundle, and the authorities bundle.
 21 Is there anything else that he should have?
 22 MS TOUBE: I thought he had it, but if he does not, we
 23 should obviously give it to him so he can look at it before
 24 Thursday.
 25 MRS JUSTICE BACON: Yes. What about anybody else?

153

1 Because although he is now being sent the hearing bundle so
 2 he can see what is being referred to, I am assuming that
 3 other investors who are making submissions will not have had
 4 that.
 5 MS TOUBE: No, I do not think anyone has asked us for
 6 it.
 7 MRS JUSTICE BACON: Right, but is it the case that, if
 8 anyone wants to see that before Thursday, they can ask you
 9 for it, so that they can participate as necessary at the
 10 consequential hearing?
 11 MS TOUBE: Yes.
 12 MRS JUSTICE BACON: And similarly with the voting form?
 13 MS TOUBE: Yes, I think that is important. If he does
 14 have any useful points for us on the voting form, we would
 15 obviously like to see that.
 16 MRS JUSTICE BACON: Yes, and if the two other investors
 17 I am about to hear from also have points on the voting form,
 18 you will want to hear that, and then if that is not resolved
 19 before Thursday, I will want to hear that as well.
 20 MS TOUBE: Yes.
 21 MRS JUSTICE BACON: So, can I leave it to you to liaise
 22 with Mr Pyatt and— I am just going to get their names up.
 23 MS TOUBE: I think it is Mr Dickenson and Mr Allan.
 24 MRS JUSTICE BACON: Mr Allan and Mr Dickenson, to
 25 ensure that they have the documents that they need.

154

1 MS TOUBE: Yes. We must have their emails because we
 2 would have handed them over.
 3 MRS JUSTICE BACON: Well, yes, and it is from you that
 4 I understood that those are the parties that want to make
 5 submissions, so you will have their contact details.
 6 MS TOUBE: Yes.
 7 MRS JUSTICE BACON: All right. Are there any— Yes?
 8 MR PYATT: My Lady, can I just— One important fact
 9 I'd like to ask and to mention.
 10 So, last week, the FCA had their open public meeting
 11 where Therese Chambers stood up and supposedly called
 12 (inaudible) my learned friend at the back here, said, "If
 13 this Scheme is approved, when it's approved, we will release
 14 our report that's taken four years to do." She didn't say
 15 the last bit. Now, that report has material evidence that
 16 investors must see, because — I start at the beginning — to
 17 make a good decision, you need good information. The
 18 FSC(sic) report needs to come out before the vote so that
 19 people can people can look at it and make their own
 20 decisions, because at the moment, it's being skewed.
 21 MRS JUSTICE BACON: Yes, that was a point that was made
 22 in your submission, and I would hope that that can be
 23 addressed in the reply submissions from the company and the
 24 FCA.
 25 MR PYATT: If you get it out of them, my Lady, you're

155

1 doing very well, because we've been asking for it for years.
 2 MRS JUSTICE BACON: Well, I am going to just ask them
 3 for submissions on that. All right, so thank you very much,
 4 Mr Pyatt. Now, I am willing to hear from Mr Allan and Mr
 5 Dickenson to the extent that those wish to make points that
 6 have not already been made today, but I would ask for very
 7 brief submissions of no more than five to ten minutes. Are
 8 Mr Allan and Mr Dickenson on the video feed? Is someone
 9 able to contact them and let them know they can speak now if
 10 they want to? Mr Dickenson.
 11 MR DICKENSON: I should be switched on now, Mr
 12 Dickenson, yes.
 13 MRS JUSTICE BACON: Yes, we can see you and hear you.
 14 Can you see and hear us?
 15 MR DICKENSON: Yes, I can hear you.
 16 MRS JUSTICE BACON: Thank you. So, do you want to make
 17 any submissions that you want in the next five to ten
 18 minutes?
 19 SUBMISSIONS by Mr DICKENSON
 20 MR DICKENSON: Yes, please. Firstly, thank you for
 21 allowing me to speak. My name is Graham Dickenson. I
 22 represent myself and my wife. We both have direct holdings
 23 in the Woodford funds. I'll try not to duplicate, but
 24 please bear in mind I don't have the court bundle, and I've
 25 not been able to hear significant parts of the audio. I

156

1 will try and get through as succinctly as possible. What
 2 I'd like to put to you is an understanding of the Scheme
 3 from the viewpoint of one of the many thousands of investors
 4 whose pensions and savings have severely disrupted. Very
 5 briefly, from our point of view, we have put in
 6 approximately £97,000 into the funds. At the end of 2018,
 7 and during the period where FCA have identified that the
 8 mismanagement had started to occur, that had dropped to
 9 about 87,000. So, I think part of that drop would be normal
 10 investor risk. Some of it is probably down to the
 11 management shortcomings.

12 A month or so after the closure date, we were down to
 13 70,000, and we've received, to date, about 51,000. So, by
 14 my reckoning, we're approximately 30,000 to 35,000 short.
 15 My best calculation, from the limited information available
 16 to me, is that we might get £5,000 to 6,000 pounds if we're
 17 lucky, so there's quite a gap between what we think we've
 18 lost and what we think we'll get. There has been a lack of
 19 clear information and communication from Link, and the
 20 communications are littered with, I think, false
 21 reassurances. By direct reference to the Link letter of 28
 22 July, it says there that, "LFSL has entered into ongoing
 23 discussions with relevant stakeholders to further develop
 24 the detailed terms of the Scheme." Now, to my mind, the
 25 most numerous and the most relevant stakeholders are the

157

1 creditors, and I'm not really aware of any substantive
 2 discussions that are ongoing with those other than the very
 3 limited remit of the Committee it set up, whose members I
 4 don't think we know, and whose report is not yet available
 5 to us. So, I'm not sure what ongoing discussions are
 6 referred to there, but I have to say that most of the
 7 correspondence is littered that sort of phraseology. We're
 8 faced-----

9 MRS JUSTICE BACON: I am sorry, Mr Dickenson, what
 10 committee are you referring to?

11 MR DICKENSON: Sorry. The letter of the 28 July, which
 12 was sent by LFSL to investors, but that came via an
 13 investment platform rather than directly.

14 MRS JUSTICE BACON: Yes. You just said that there had
 15 been no substantive discussions with creditors other than
 16 with a committee. Were you talking about the Transparency
 17 Task Force, or-----

18 MR BOMPAS(?): The Investor Committee?

19 MRS JUSTICE BACON: The Investor Committee, I see.

20 MR DICKENSON: The Investment Committee it set up, but
 21 I think that has a limited remit in what it can do. So, as
 22 investors, or as creditors, we're faced with being forced to
 23 vote in the near future on what looks like, on the face of
 24 it, a very inadequate amount, and an amount that remains
 25 extremely uncertain. There are unexplained decisions handed

158

1 down by FCA, which are the basis for all of this, and none
 2 of this has been discussed or challenged in any effective
 3 way. It appears to me, as one of the creditors, that the
 4 Scheme is geared to what LFSL can afford, and from FCA's
 5 point of view, just to close this down cleanly, possibly
 6 excluding other sources of restitution, perhaps the FSCS.

7 There are several very specific concerns. Firstly, the
 8 amount. I referred to the LFSL letter of July. There is a
 9 later one of 7 September, which isn't on their website yet,
 10 as far as I can see. That refers to NAV, net annual value,
 11 of the fund, £3.6 billion at the suspension date, and that
 12 there have been proceeds of £2.56 billion paid since then.
 13 Now, to my simple maths, that leaves something north of £1
 14 billion as the shortfall, but then, later on, we have,
 15 without explanation of how it's arrived at, an assessment of
 16 the loss 298 million. So, that's a huge concern to those of
 17 us that have been asked to vote about it. How has that
 18 figure been arrived at where, on the face of it, it's less
 19 than a third of the loss that's covered in the same letter?
 20 The final amount remains very uncertain. It depends on the
 21 sale of the company. It depends on other unknown
 22 litigation. It depends on expenses and expenditure that
 23 seem to be entirely at the discretion of LFSL (sic).

24 I can't see any sign of any oversight or control of
 25 that expenditure, and there's a £50 million reservation for

159

1 that, so rather than keep saying, "We could get up to 230
 2 million," it would be fairer to say, "We should bank on 180
 3 million, but if we're lucky and they don't spend the 50
 4 million, we'll get a bit more." It's just how you put that
 5 into the letter and the language. I'm also concerned with
 6 the start date of the loss calculation. FCA has ruled,
 7 apparently, that the behaviour leading to the loss started
 8 during the previous year. However, they've set the
 9 calculation date from the date of closure. What about the
 10 losses that were incurred prior to that closure? We, as
 11 creditors, have been unable to challenge or even discuss the
 12 FCA approach to this. It has simply been handed down and
 13 everyone's running with it now as the way forward, but
 14 there's a huge gap in terms of our understanding and
 15 acceptance of it. I'm concerned that FCA have only made a
 16 partial determination after all these years of deliberation,
 17 and it appears to be quite focused on heading off any
 18 further claims and tying investors up with this Scheme. It
 19 makes me wonder, is there a conflict of interest here? Is
 20 FCA trying to balance the interest of creditors it's
 21 supposed to protect, or is it protecting the public purse,
 22 perhaps? I don't know.

23 On the figures that FCA put forward, the smallest
 24 shortfall fall is 298 million, less 230 million. So, the
 25 shortfall, at best, is 68, but if any money is taken out of

160

1 that reserve 50 million, then the shortfall will be greater
 2 than 68 million. It seems to me that this uncovered loss is
 3 a natural subject for FSCS to address, and surely FCA should
 4 have involved FSCS in this matter long since, and surely we
 5 should know, before we have to vote, what the FSCS position
 6 is on this, and what the risk is to us as to whether there's
 7 any prospect of getting anything else, or do we sign our
 8 rights away forever by signing this Scheme? There are too
 9 many questions like this outstanding. Another question I
 10 have is why is the insurance figure so low? We're told it's
 11 £48 million. Now, here we have an organisation licensed, as
 12 I understand it, to manage £82 billion worth of funds, and I
 13 believe this fund was somewhere around 12 or 13 billion at
 14 its height, and it seems to me that insurance cover that
 15 only covers to 48 million is woefully short. Does FCA not
 16 have a role in making sure companies that it licenses have
 17 adequate cover and we don't have this sort of shortfall?
 18 The other thing is that the Link Group, like many companies,
 19 limits its liabilities by compartmentalising its business
 20 into sub-companies which have limited assets, as we see
 21 here. How is it that it is allowed by our regulatory system
 22 overseen by FCA? How are they allowed to trade without
 23 being underwritten by the bigger group resources? That
 24 seems to be another shortfall here.

25 The other thing that concerned me was that there is no

161

1 reference really throughout the correspondence being put
 2 out, apparently with the blessing of FCA, to the possibility
 3 that's been raised by others, and which I agree with, that
 4 an action could proceed. It would establish that LFSL may
 5 fail to meet its liabilities, and it would fail, and the FCA
 6 could then use a restitution order to put unrecovered losses
 7 to FSCS. It seems to me that that's been entirely ruled out
 8 as a solution. I have a minor question as a platform—
 9 holder through a platform. Will I actually get to vote as
 10 an individual on this or will the platform use my vote?
 11 There seem to be a lot of uncertainties here for which there
 12 are questions.

13 So, I've (inaudible) through a bit. In conclusion, I
 14 have to say that I'm very surprised at the extremely limited
 15 Creditor presence here at this very important hearing, and I
 16 think it reflects the real difficulty faced by Creditors in
 17 following and engaging with this process. I mean, frankly,
 18 most people haven't got a clue what's going on, and the
 19 previous speaker alluded or mentioned the failure to
 20 properly communicate with Creditors. It does put a very
 21 heavy burden on your Ladyship to look after the interests of
 22 those Creditors who may be forced by this Scheme to arrive
 23 at voting on something where there are so many unknowns and
 24 unexplained questions, where the return looks extremely
 25 poor, and it has all the hallmarks of something being put

162

1 through at great pace and with great determination and
 2 without really consulting or taking account of the interests
 3 of those who will be affected. The Scheme seems to me to be
 4 very keenly focused on the needs of the Link Group and its
 5 sale and the wish of the FCA to tuck this away and fold it
 6 all up and move on, and I feel that we will be losing out as
 7 a result of that approach.

8 I think your decision, therefore, must ensure that the
 9 agendas of LFSC (sic) and FCA do not take precedence over
 10 the interests of us Creditors. We must have, please,
 11 adequate time to see all of the support and background and
 12 documents and calculations. The latest thing on the website
 13 at the moment is the letter 28 July. We must have a proper
 14 explanation of the quantum calculations and some opportunity
 15 to challenge and discuss them. No vote should be imposed
 16 until the various uncertainties, especially those revolving
 17 around these reserve costs, the sale price of LFSC, are
 18 contractually firmed up and more certain within very tight
 19 parameters. It would also be preferable, surely, to have
 20 involved FSCS and to have a more certain outcome from that
 21 organisation available to inform our vote on this Scheme,
 22 and I think, your Ladyship, that the timetable from here
 23 should make provision to do exactly that. Currently, based
 24 on the incomplete information, the uncertain outcome and the
 25 very low perspective payment, personally, I would not feel

163

1 I'm risking very much to say, "Well, no," not to this
 2 Scheme. I'd rather take my chances of a better recovery
 3 through an action. I must simply ask that your
 4 determination takes these points into account and that you
 5 issue directions and a timetable to ensure that this is done
 6 properly and without undue haste to the detriment of the
 7 shareholders and the investors. Thank you. That's all I've
 8 got to say.

9 MRS JUSTICE BACON: Thank you very much for your very
 10 helpful submissions, Mr Dickenson. That leaves Mr Allan.
 11 Is Mr Allan online? Is Mr Allan there? In the courtroom we
 12 are hearing some sounds, but we cannot hear Mr Allan. If
 13 you are not Mr Allan, can you please mute? If you are Mr
 14 Allan, can you please come online so that we can see you and
 15 hear your submissions? Is anyone in contact with Mr Allan?

16 MS TOUBE: We did send him an email, but we have not
 17 had a response.

18 MRS JUSTICE BACON: All right. Well, Mr Allan has been
 19 invited to make submissions. I understand that he has been
 20 sent a link. Can someone tell me if he is actually online?
 21 And can whoever it is who is not muted please mute
 22 themselves? We are getting a lot of noise this end. No.
 23 All right.

24 MS TOUBE: I am afraid we do not have the link, so we
 25 cannot see who is online.

164

1 MRS JUSTICE BACON: No. All right. Can somebody
2 please send my clerk an email?
3 MR PYATT: He is not online. I am told by the FCA.
4 MRS JUSTICE BACON: All right. Thank you. Can someone
5 please send my clerk an email to ask her to mute anyone who
6 is online? Thank you. So, Mr Allan has been given an
7 opportunity to attend. I understand that he has been sent
8 the link. Can anyone confirm that----
9 MS TOUBE: The link would come from the courts, so we
10 do not know the answer to that.
11 MRS JUSTICE BACON: Right. Has anyone had any-- well,
12 has anyone had any communications with Mr Allan today? I
13 think I might just rise to make enquiries as to whether he
14 has been sent the link and whether he has been at all on
15 today or whether he has just chosen not to attend. When did
16 you last hear that Mr Allan wanted to make submissions?
17 MS TOUBE: On Sunday evening.
18 MRS JUSTICE BACON: All right, and was he included in
19 the list of people that you sent to my clerk?
20 MS TOUBE: Yes.
21 MRS JUSTICE BACON: So, it is reasonable to assume that
22 he would have been sent a link.
23 COUNSEL: There is an email address that looks relevant
24 on what your clerk sent out. It reads as though it would be
25 his-- looks like it is his name @btinternet.

165

1 MRS JUSTICE BACON: All right. I am just going to rise
2 for five minutes to make sure he was sent the link. If he
3 was sent the link but does not come on, then I am just going
4 to carry on. We do need to finish the hearing this evening.
5 Is everybody all right to sit a little bit late? All right,
6 and while I have risen, you might just take the opportunity
7 to discuss between you some of the points that Mr Pyatt and
8 Mr Dickenson have made regarding the logistics because I
9 would be grateful for your responses on that, including-- I
10 mean timing may be something that we can revisit on
11 Thursday, but there seem to be some fundamental issues, such
12 as individual platform vote and the information that is
13 provided to the investors ahead of the vote, which it might
14 be useful to just trail now in so far as progress can be
15 made.
16 MS TOUBE: Yes, that may also come out of the
17 discussion that we are having on the voting (inaudible)
18 before Thursday.
19 MRS JUSTICE BACON: Yes, I understand. All right.
20 Well, I will rise for five minutes, and then we will resume.
21 (4.15 p.m.)
22 (Short break)
23 (4.25 p.m.)
24 MRS JUSTICE BACON: It seems that there was some lack
25 of clarity as to whether Mr Allan had been sent the link.

166

1 Certainly, he has not asked for it again today. He has now
2 been re--sent it or sent it for the first time; we are not
3 entirely sure. What I am going to do is to resume the
4 hearing. If Mr Allan has now joined, he should make himself
5 known. Otherwise, what I will do is I will give you a
6 chance to make your response submissions, Ms Toube, and then
7 I will ask again if he is there before the end of the
8 hearing.
9 MS TOUBE: Thank you very much.
10 MRS JUSTICE BACON: So, I am assuming that the reply
11 will be from you and insofar as necessary only from Mr
12 Smith, but I am assuming that Ms Cooke is not going to
13 reply. Is that right?
14 MS COOKE: That is correct.
15 MRS JUSTICE BACON: All right.
16 MR BOMPAS: My Lady, may I just to raise the point, I
17 am not actually sure why Mr Smith would be replying.
18 MRS JUSTICE BACON: Well, there were various points
19 made about the FCA's role. I am not encouraging him to make
20 lengthy submissions, but if it is necessary to reply to
21 anything that you said, I would wish him to have a right of
22 reply.
23 MR BOMPAS: Very well, of course.
24 SUBMISSIONS in reply by Ms TOUBE
25 MS TOUBE: My Lady, I do not have a huge number of

167

1 points arising out of Mr Bompas's submissions, and I
2 certainly do not want to repeat points that I made in the
3 opening. If I can start with the main point, which is the
4 class point, I do not really have anything more to say
5 against-- in relation to the good versus bad claims. There
6 is nothing in the authority to support that as a reason for
7 dividing a class, and as your Ladyship pointed out, this
8 court is not in a position to determine which is a good or a
9 bad claim in any event. So, the class points really relate
10 to this issue of whether or not the relevant rights are, as
11 we say, the rights against the company or can also take into
12 account rights against the third parties, and again, there
13 is nothing in my learned friend's submissions that changes
14 the position as I put it to your Ladyship this morning.
15 There is nothing in the authorities that supports what he
16 says.
17 He attempted to distinguish UDL by saying that the
18 character of the claims there were different, but in UDL all
19 employees had this claim-- potential claim over, which would
20 then lead to a substitution by another Creditor coming in if
21 that Creditor paid first, and that is exactly the position
22 as it would be if the FSCS were pay. So, a Creditor would
23 say, "Well, I will go and collect from the FSCS first,
24 please," and the FSCS would then subrogate into an assigned
25 claim. So as far as the company is concerned, it has one

168

1 claim. That is the underlying Scheme Creditor's claim
2 against the company. If there is no FSCS claim, then of
3 course the FSCS does not come in at all, but this is no
4 different from an individual investor who has insurance or a
5 guarantee or joint liability or any other thing, which is a
6 right against a third party. Those are not rights that the
7 court looks at when determining questions of classes.

8 MRS JUSTICE BACON: I think, if I understand it, the
9 submission in relation to UDL was being put on the basis
10 that in this case it was a case where the right— the
11 third—party right was derivative on the right against the
12 company. That is my understanding of at least part of what
13 Mr Bompas was saying.

14 MS TOUBE: Yes, and what I am saying is if that is
15 right, then the same was true in UDL. Yes, and indeed Gate
16 Group. So, what the court has said is that those are
17 interests not rights. One looks only at the right against
18 the company, and you will recall that Mr Smith drew your
19 attention this morning to a call and said, "Well, when one
20 is looking at these rights, one looks at the question of
21 what would happen in an insolvency, and in an insolvency
22 there would be a claim against the company." What an
23 individual might go off and do and recover from the FSCS or
24 do something else would be a matter for it, but it is not,
25 in any of these cases, a question of what are the rights

169

1 there might be against their parties.

2 In Gate Group, for instance, you will recall from a
3 passage that my learned friend showed you that what happened
4 in that case was that the court took the view that one could
5 look through the artificial deed of contribution structure,
6 which we put in place in that case, and say, "Well, there
7 are different rights against the company coming out of the
8 plan," and so there were different rights out, and so the
9 classes were split for that reason. Not that there were
10 different third—party rights or any other issue like that.
11 The court looked at rights against the company coming in,
12 rights against the company going out, and that is always
13 what it does, and just as an aside, that is the same in
14 Hawk. I think my learned friend suggested in Hawk that
15 there were split classes depending on what insurance people
16 had. That was the decision at first instance by Mrs Justice
17 Arden, as she then was. That was appealed, and in the Court
18 of Appeal, the Court of Appeal said, "No. There is one
19 class. She has got it wrong. In fact, the rights are not
20 so dissimilar as to make it impossible for these parties to
21 consult together."

22 MRS JUSTICE BACON: Is this a situation, as suggested
23 by Mr Bompas, where the rights of the individual Creditors,
24 the retail investors, might or would be adverse to those of
25 the institutional investors?

170

1 MS TOUBE: Well, it is difficult to know the answer to
2 that question. They are all unsecured Creditors. They all
3 have an interest in recovering sums from the company which
4 they would be able to prove for. They might have different
5 interests from one another, but they do not have different
6 rights.

7 MRS JUSTICE BACON: And it is not a situation of
8 adverse rights in that it is a zero—sum game as against the
9 company, so that if one recovers more, then the other will
10 recover less, rather it is a question as to whether the
11 retail investors might have an additional claim against the
12 FSCS to put them in a better position.

13 MS TOUBE: So just to unpick that, if what one is
14 looking at is only rights against the company, one leaves
15 out of account, for the purposes of class composition
16 position, the question of the claim against the FSCS.
17 Different interests that people have may be relevant to
18 questions of fairness which will be considered at sanction,
19 but they are not matters which split the class. In any
20 insolvency, Creditors will have different claims for
21 different amounts, and the only question is how is that
22 dealt with? And some of them may be stronger claims, some
23 of them and maybe weaker claims, as your Ladyship saw from
24 the passage from Cimolai and Noble, so what one has is
25 different sorts of claims which may have different values.

171

1 Now, in an insolvency, they are all dealt with pari—passu at
2 whatever value they are, but they are all the same rights
3 against the company in the sense that they are all
4 unsecured, contingent Creditors, remembering, of course,
5 that they are all disputed by the company.

6 MRS JUSTICE BACON: So, your point is that once the
7 debt has been proved in the insolvency, which has been
8 commented in one of the cases that may be a complex process,
9 but once that is been proven, the cause of action does not
10 make a difference.

11 MS TOUBE: No.

12 MRS JUSTICE BACON: It is going to be pari—passu.

13 MS TOUBE: Yes.

14 MRS JUSTICE BACON: Yes. What Mr Bompas was saying is
15 that this court can, I think he said, discount or disregard
16 the claims by the institutional investors because he said
17 they were so weak. He went so far as to say that they were
18 certain to fail, that he was implying that. What is your
19 response to that?

20 MS TOUBE: Well, that is an assertion. The assertion
21 that is made, all that is happened in this case is that the
22 claims have been issued. There is no judgment on them— on
23 my learned friend's claims, and so the court is just not in
24 a position to say these claims are better than that claims.
25 What it has is some claims which have been brought at the

172

1 FCA's position in relation to its draft statement, all of
2 which, of course, are disputed by the company. So, what we
3 have is a whole series of contingent claims of different
4 kinds but all, essentially, for unsecured Creditors, and we
5 do not know what the value of any of them are, and we do not
6 know if any of them are good claims or bad claims. We just
7 know they have been asserted. So, my learned friend says,
8 "Well, it is easier for me to establish this," and the
9 answer is who knows, and the court cannot possibly tell.

10 MRS JUSTICE BACON: Yes.

11 MS TOUBE: So, that is the position in relation, I
12 think, to those. There was one point I was going to make on
13 Cimolai, and Mr Al-Attar reminds me of two points. First of
14 all, your Ladyship saw, I think, from the passage we looked
15 at earlier that the court said that this was a very unusual
16 case in which it was going to split a class, and this was a
17 submission by the company that it should split a class in
18 this particular way, and it split a class of disputed
19 creditors because this particular class, and just for your
20 reference, you will see this from para.7 of the judgment,
21 which is 476 of the bundle, but this particular class had
22 huge potential counterclaims.

23 MRS JUSTICE BACON: Now, was Cimolai the one where
24 there was a comment about the different outcomes of
25 litigation and the different parties having different

173

1 strategies in litigation?

2 MS TOUBE: Yes.

3 MRS JUSTICE BACON: Yes, I remember that passage.

4 MS TOUBE: Yes.

5 MRS JUSTICE BACON: So you say it is that one group of
6 creditors had large counterclaims?

7 MS TOUBE: Yes, against them. Yes. As Mr Al-Attar
8 reminds me, that this was a case in which, in fact, the
9 counterclaims were so large that they were actually better
10 off if the company went into liquidation, which was a
11 completely different position from the other creditors, and
12 the court said, as your Ladyship saw at paras.52 and 53,
13 that this was a very unusual case, where the judge had said,
14 "Normally, we would treating all these people as if they
15 were the same," and that is the passage we cited in our
16 skeleton.

17 MRS JUSTICE BACON: Yes, and in this case, there is no
18 suggestion from anyone that any group of creditors would
19 deserved if the company goes into liquidation. Rather, that
20 depending on where the FCA comes out and depending on the
21 overall assets that have been available, some of the
22 investors may then have an FSCS claim and there may be
23 further individual claims on top of the FCA distribution,
24 but as Mr Bompas conceded, that might not be the case for
25 all of the investors.

174

1 MS TOUBE: Yes.

2 MRS JUSTICE BACON: Yes.

3 MS TOUBE: And then I think he made one point on Apcoa.
4 He relied on the passage where the judge expressed his view
5 that there might sometimes be a blurred boundary, but your
6 Ladyship will have seen that, again, that was in the context
7 of rights out. So the court would say sometimes there is a
8 blurred boundary between what these rights are when there
9 are rights conferred under the Scheme. So, I think that is
10 all I had to say on Mr Bompas' points, unless your Ladyship
11 having further questions for me on those?

12 MRS JUSTICE BACON: Well, on that last point, you were
13 saying that this is not about the rights conferred by the
14 Scheme, this is about the pre-existing rights against the
15 company. What about the point that although the Scheme
16 itself does not provide for the FSCS compensation claim to
17 be extinguished, it has that effect de facto? So one might
18 be looking at different types of rights out under the
19 Scheme.

20 MS TOUBE: Well, they are not different rights out
21 because the Scheme treats everybody in exactly the same way.
22 There is no release of the FSCS claim under the Scheme.
23 What there is is if there is no claim, because it is
24 released, there is no possibility of an FSCS compensation,
25 but there is no possibility of FSCS compensation if there is

175

1 no valid claim in any way.

2 MRS JUSTICE BACON: Yes.

3 MS TOUBE: So it is not something that is happening
4 under the Scheme at all, and again, just to restate, if
5 there is any issue to be raised in relation to the FSCS
6 point, that is an interests point. Again, it is a matter
7 that can go, if anything, to fairness, and it is a matter
8 for sanction, but not a matter for class.

9 MRS JUSTICE BACON: All right, thank you.

10 MS TOUBE: I am not going to say anything about voting
11 forms or timing now because I hope we can sort out some of
12 these points before Thursday. I just did want to say one
13 point, because I know that a number of people, including Mr
14 Bompas, have made this point about not sharing information—
15 sharing information with the FCA, but not sharing the drafts
16 of the explanatory statement with the creditors. The FCA is
17 not a creditor. Obviously, the FCA is the regulator, and it
18 is important for us and also for the Scheme Creditors that
19 the FCA should be involved and be content with the process
20 that is going ahead.

21 There is quite a lot of dicta in the cases about not
22 sharing information unequally between your creditors. So,
23 in fact, we cannot advantage one group of creditors, unless
24 there is a steering committee or other notice like that.
25 So, for example, the Investor Committee, we can share, could

176

1 share, and did share with them specific information, but we
2 are actually instructed by the authorities not to give
3 information to some creditors and not to others. Now, the
4 result of that, of course, is that people do not get to see
5 it until the bundles filed leave court, but I would hope,
6 bearing in mind the points that have been already picked up,
7 that if there are any points, people will pick them up and
8 share them with us.

9 MRS JUSTICE BACON: Yes, I mean, there are some
10 specific comments about the information that is given, in
11 particular raised in Mr Pyatt and Mr Dickenson's
12 submissions, which I think will need to be addressed, in
13 particular, they were concerned that they will not know
14 before voting what the FSCS position is, ultimately.

15 MS TOUBE: Yes. They will know that; they do know
16 that, because the FSCS's position is it cannot say.

17 MRS JUSTICE BACON: That is not right. So you are
18 saying that that is not going to improve before then. What
19 about the FCA statement, or determination, which I
20 understand will be made, on your hypothesis, after the
21 Scheme has been approved? Now, Mr Pyatt said that should be
22 released before the court meeting.

23 MRS JUSTICE BACON: If I can ask Mr Smith to answer
24 that. We have no concerns from the company's point of view,
25 but there are statutory confidentiality issues, as I

177

1 understand it. I do not know where the FCA has got on this,
2 but perhaps Mr Smith can answer that.

3 MRS JUSTICE BACON: Well, yes, I will come to Mr Smith
4 in a minute. So, you do not have a concern about the
5 release of the FCA report before the court meetings?

6 MS TOUBE: If the FCA thinks fit, then we are content
7 with that.

8 MRS JUSTICE BACON: What about the general point as
9 regards information about how information is got to the
10 creditors and the difficulties of the investors in getting
11 information from their platforms, if the platform simply
12 posts up a message which may be on its face in quite generic
13 form on the platform portal?

14 MS TOUBE: So, the first point, I suppose, is that
15 these are investors who have chosen to invest through
16 intermediaries using a portal, and so their normal way of
17 having communication from the company is through the portal,
18 and so, as with all other schemes in fact, that is the way
19 in which we have sought to communicate with them. We have
20 also expressly sought to communicate with the intermediaries
21 asking them to pass on the information and we have
22 advertised. My concern is that anything else we do will be
23 some sort of ad hoc process. It might end up communicating
24 differently with different sets of Scheme Creditors, and we
25 would be reluctant to have that happen. In relation to the

178

1 suggestion that we could contact the portals and ask them to
2 give us all the underlying email addresses, we would suspect
3 that is a data protection issue in any event. So our
4 concern with that is that if we try to communicate with
5 investors in a way differently from the way in which they
6 are normally communicated with, that will actually cause
7 more problems than it solves.

8 MRS JUSTICE BACON: Yes.

9 MS TOUBE: Of course, if anybody has suggestions as to
10 what else we can do, we will do so. We want people to come
11 along and vote.

12 MRS JUSTICE BACON: Yes, and at the very least are you
13 able to get out a message before the court meeting meetings,
14 such that if individual investors want more information,
15 particularly, for example, the point being made about the
16 way in which the 298 was calculated, which was set out in
17 one of the documents in the hearing bundle? Now, that came
18 out today. I think Mr Pyatt had not seen that before; Mr
19 Dickenson still, when he made his admissions, had not had
20 access to the hearing bundle. Are you able to ensure that
21 anyone asking for that is able to receive it?

22 MS TOUBE: Yes, we would not have any problem with
23 sending a message to the— — — —

24 MRS JUSTICE BACON: To the portals?

25 MS TOUBE: — — portals.

179

1 MRS JUSTICE BACON: Yes. That question was not
2 directed at the question of how to communicate, but could a
3 message be got out via the means that you have specified to
4 ensure that investors can obtain the material they want to
5 comment?

6 MS TOUBE: Yes, we would be able to do that.

7 MRS JUSTICE BACON: And what about the question about
8 platform voting? Is that a voting form issue, or is it a
9 sort of higher level question which we can address now?

10 MS TOUBE: So, I think there are two issues. The
11 higher level issue is the one we have already discussed,
12 which is what is the best way actually to get hold of Scheme
13 Creditors? Is it through their portal at all?

14 MRS JUSTICE BACON: Yes.

15 MS TOUBE: The other question, which I think that Mr
16 Dickenson was alluding to, and I think it was in the Leigh
17 Day letter, they said that some of the intermediaries had
18 sent out a letter saying, "We will vote on your behalf."

19 MRS JUSTICE BACON: Yes.

20 MS TOUBE: And that will depend, of course, on what the
21 contractual arrangements are between an investor and the
22 intermediary, so who is the scheme claim holder, but
23 ultimately, when it comes down to voting, it is the Scheme
24 Creditor who will vote. So if the intermediary is the
25 voter, so under arrangements between them and the underlying

180

1 beneficial investor that is the person who does the voting,
 2 then that is the person who will be able to do the voting,
 3 but if the person who is the underlying beneficial owner is
 4 the person who is allowed to vote separately, then they
 5 should be allowed to vote separately.
 6 MRS JUSTICE BACON: Yes, so what you are saying is it
 7 will depend on the contractual arrangements between the
 8 investor and their particular platform?
 9 MS TOUBE: It will.
 10 MRS JUSTICE BACON: Some platforms will vote on behalf
 11 of all of the individual investors; other intermediaries may
 12 not.
 13 MS TOUBE: Yes.
 14 MRS JUSTICE BACON: I see.
 15 MS TOUBE: And I suppose that an underlying beneficiary
 16 could revoke the authority of its intermediary to vote.
 17 MR AL-ATTAR: If it is revocable.
 18 MS TOUBE: Yes, right, if it is revocable, I do not
 19 know. That would depend on the contract.
 20 MRS JUSTICE BACON: Yes. All right.
 21 MS TOUBE: But ultimately the voting form issue is
 22 making sure that the right person who is entitled to vote
 23 votes, and making sure that you do not get two people voting
 24 twice for the same vote.
 25 MRS JUSTICE BACON: Yes.

181

1 MS TOUBE: That is what we have tried to deal with.
 2 MRS JUSTICE BACON: Yes. All right. As a final
 3 question, and I know it is late, I wondered if as part of
 4 your review of the documents, the explanatory statement can
 5 build in some of the points that have been raised by Mr
 6 Pyatt and Mr Dickenson insofar as not already there. So,
 7 for example, information on where they can obtain more
 8 information about the underlying calculations or perhaps
 9 putting in the underlying calculations. I do not know if
 10 the explanatory statement recites the position of the FSCS
 11 already, but-----
 12 MS TOUBE: I think that it does.
 13 MRS JUSTICE BACON: -- if not, so that a full
 14 explanation is given or so that creditors who at least read
 15 that statement are not still left in the dark as to what the
 16 FSCS position is.
 17 MS TOUBE: I think the answer is it already does.
 18 MRS JUSTICE BACON: Right.
 19 MS TOUBE: Whatever we put in the explanatory statement
 20 about the position of the FSCS, has to be agreed also by the
 21 FSCS.
 22 MRS JUSTICE BACON: Of course.
 23 MS TOUBE: So, I know there is wording in it, because I
 24 know that there were things that they did agree.
 25 MRS JUSTICE BACON: Yes.

182

1 MS TOUBE: But we can review that and, if possible, try
 2 and get them to agree whatever wording. We obviously want
 3 to make it as clear as possible.
 4 MRS JUSTICE BACON: Yes, and for the investors to be
 5 given as much information as possible-----
 6 MS TOUBE: Understood.
 7 MRS JUSTICE BACON: -- in order to allow them to make
 8 an informed decision. All right. Did you want to say
 9 anything else at this stage, not relating to the question
 10 about voting rights or voting for?
 11 MS TOUBE: No, my Lady.
 12 MRS JUSTICE BACON: All right. Just before I call upon
 13 Mr Smith for the FCA to make any final comments, can I check
 14 whether Allan has now come online? Right, I think that the
 15 answer to that is no. Right, Mr Smith. This is just to
 16 address any points, reply points only, arising out of the
 17 submissions that have been made on the other side of the
 18 courtroom.
 19 SUBMISSIONS in reply by Mr SMITH
 20 MR SMITH: Yes. I mean, I did not have any reply
 21 points to my learned friend Mr Bompas, unless you, your
 22 Lady, have any questions for me? All I was going to deal
 23 with was what my learned friend had raised about the Draft
 24 Warning Notice, which I think is a good reference to the
 25 submissions from Mr Dickenson. My Lady, so as far as that

183

1 is concerned, the Warning Notice, at present, is a Draft
 2 Warning Notice. It contains confidential information which
 3 has been received by the FCA. As such, there is a statutory
 4 prohibition on disclosing the information. That is s.348 of
 5 FSMA. Essentially, what that provides is the confidential
 6 information cannot be disclosed without the consent of both
 7 the person for whom it was obtained or if different, the
 8 person to whom it relates, and what that means in practice
 9 is that you need the consent of every person to whom the
 10 information relates, and that is very unlikely to be
 11 obtainable as a matter of practice.
 12 Now, there are certain exceptions to that in s.349, but
 13 we do not consider any of them apply in this case in
 14 relation to the publication of the Draft Warning Notice. If
 15 I can just explain why that is not necessarily surprising
 16 and how the procedure essentially works is that obviously we
 17 are at the Draft Warning Notice stage; what would then
 18 happen, as your Ladyship knows, is the Warning Notice would
 19 then be issued.
 20 So far as the Warning Notice is considered, there is a
 21 statutory prohibition on disclosure in s.391, and obviously,
 22 the purpose of that is to enable those who are subject to
 23 the Warning Notice who are referenced in it to challenge
 24 that before the Regulatory Decisions Committee, and it is
 25 only when one gets to the stage of a Decision Notice that at

184

1 that stage it would have been made public. So under the
 2 normal regime, you only get publicity when the Decision
 3 Notice is issued, and one can understand the sense that it
 4 no doubt goes back to things like Maxwellisation, that those
 5 who are named in these documents and potentially the subject
 6 of criticism that is an opportunity to challenge that before
 7 the document is published. So, that is the basic regime,
 8 but insofar as we are concerned, we are not at liberty to
 9 disclose of it as a statute of the prohibition.

10 MRS JUSTICE BACON: So, can I just understand what is
 11 the procedure that you envisage will be followed if the
 12 Scheme is approved-----

13 MR SMITH: Yes.

14 MRS JUSTICE BACON: -- that then gets you to the point
 15 of issuing something that will be published?

16 MR SMITH: Well, we will be issuing it; I do not
 17 believe we would be making it public, as I understand. If I
 18 am wrong-- Yes, I mean, if there was a Decision Notice
 19 subsequent to the Warning Notice, at that point the Decision
 20 Notice would be made public.

21 MRS JUSTICE BACON: So, what-----

22 MR SMITH: The Warning Notice would not, I do not
 23 believe, be made public.

24 MRS JUSTICE BACON: Okay, so what is going to be
 25 published after the Scheme is approved, if it is approved?

185

1 MR SMITH: So, the Warning Notice would be issued, so
 2 that would go from a draft to a Warning Notice. The Warning
 3 Notice would not be published. Then the Decision Notice
 4 would presumably follow fairly quickly, because on this
 5 hypothesis the company would not be putting in submissions
 6 opposing the Warning Notice, and it is the Decision Notice
 7 that is in accordance with the normal practice that would be
 8 published.

9 MRS JUSTICE BACON: All right, so that is the process
 10 that you envisage being followed that-----

11 MR SMITH: If the Scheme is approved, yes.

12 MRS JUSTICE BACON: -- after the class meeting or
 13 meetings-----

14 MR AL-ATTAR: My Lady, the point is actually set out in
 15 the explanatory document at p.125, para.26, which explains
 16 that both Warning Notice, Decision Notice and Final Notice
 17 will be issued as soon as practical.

18 MR SMITH: Yes. So, in terms of public-----

19 MRS JUSTICE BACON: I am sorry, which page of the
 20 bundle are we looking at?

21 MR AL-ATTAR: It is p.125.

22 MRS JUSTICE BACON: 125. Yes, I think that is not
 23 inconsistent with what Mr Smith has just said, and that is
 24 very helpful. The clarification is helpful. So you would
 25 be intending to issue the Warning Notice-----

186

1 MR SMITH: Yes.

2 MRS JUSTICE BACON: -- after the approval of the
 3 Scheme-----

4 MR SMITH: Quite. Exactly.

5 MRS JUSTICE BACON: -- followed by the Decision Notice
 6 and Final Notice?

7 MR SMITH: Yes.

8 MRS JUSTICE BACON: The Decision Notice and Final
 9 Notice would be published, but the Warning Notice would not
 10 be?

11 MR SMITH: Correct.

12 MRS JUSTICE BACON: All right, so your point is that
 13 there are statutory reasons why none of this can be
 14 published now? Firstly, you have not actually issued a
 15 Decision Notice, so there is not something that can be
 16 published, all that you have issued is a Draft Warning
 17 Notice?

18 MR SMITH: Yes.

19 MRS JUSTICE BACON: And even the Final Warning Notice,
 20 following the draft, is not something that would be
 21 published?

22 MR SMITH: Yes, quite. It is exactly that, my Lady.

23 MRS JUSTICE BACON: Yes.

24 MR BOMPAS: My Lady, I am sorry, I am very confused by
 25 this. I think that my learned friend is saying that the

187

1 Final Notice, along with the Decision Notice, will be
 2 published-----

3 MRS JUSTICE BACON: Yes, that is my understanding-----

4 MR BOMPAS: -- although the document does not actually
 5 say that.

6 MR SMITH: Yes, I am not surprised my learned friend is
 7 confused, that is exactly right.

8 MRS JUSTICE BACON: All right.

9 COUNSEL: My Lady, may I rise? Why cannot we have a
 10 document that has some redaction on it? You know, we can
 11 get out documents from government with redactions on it. I
 12 mean, at the moment what we are saying is Mr Private
 13 Investor is blind; we are not going to tell you what is
 14 going on, and then when the decisions happen and the report
 15 comes out, people say, "My God, if I had known this, I
 16 wouldn't have worked it this way." It just seems strange.

17 MRS JUSTICE BACON: Well, what we have got at the
 18 moment, as I understand it, is a summary that has been
 19 agreed of what is said in the Warning Notice, and that is in
 20 various documents, including, I think, the explanatory
 21 statement, but also the witness statement from Mr Midl.

22 MR SMITH: That is right. So, that is right, my Lady,
 23 and I mean, in answer to that point, I mean, if we were
 24 going to go down this exercise, looking at s.3, 4A, 1A and
 25 B, we would have to redact from the Warning Notice

188

1 information which we have received from anyone who had not
 2 given consent, and also, information relating to any person
 3 who had not given consent. So it effectively requires
 4 consent from both of the persons who provided the
 5 information, and if different, the person to whom it
 6 relates. So, I mean, if one is going to do that on a
 7 Warning Notice, that is obviously going to be a rather
 8 difficult exercise-----

9 MRS JUSTICE BACON: Yes.

10 MR SMITH: --- it may not need much then, and also,
 11 there is the separate point of whether it is actually right
 12 to do that in relation to a Draft Warning Notice, where the
 13 statute explicitly says, in relation to a Final Warning
 14 Notice, you must not publish it.

15 MRS JUSTICE BACON: You must?

16 MR SMITH: You must not publish it. You must not
 17 publish-----

18 MRS JUSTICE BACON: Yes.

19 MR SMITH: --- a Final Warning Notice. On queries, why,
 20 if that is right, it could be right to publish a Draft
 21 Warning Notice.

22 MRS JUSTICE BACON: And that is s.391?

23 MR SMITH: That is correct, my Lady.

24 MRS JUSTICE BACON: Yes. All right, thank you very
 25 much. Well, it has been a long day. I have heard from all

189

1 of you. Thank you very much for your submissions.
 2 Provisionally, we will be coming back on Thursday. If that
 3 needs to change, my clerk will let you know, but I think we
 4 will be working towards coming back on Thursday and then
 5 dealing with the outstanding matters then. At the moment,
 6 my intention would be to give judgment on an ex tempore
 7 basis on Thursday morning, as indicated. All right.

8 MS TOUBE: My Lady, if I just might make one more
 9 point?

10 MR: My Lady, I have got a question too. A request,
 11 rather.

12 MRS JUSTICE BACON: Well, all right. I will hear from
 13 Ms Toube first.

14 MS TOUBE: Thank you. We will obviously prepare and
 15 discuss with the other side updates to the Explanatory
 16 Statement. I am not attempting in any way to pre-empt your
 17 Ladyship's judgment, but we were not intending to produce a
 18 second set of documents based on two meetings. We will just
 19 continue with one for now and if-----

20 MRS JUSTICE BACON: Yes, that is the default.

21 MS TOUBE: --- any further changes are necessary-----

22 MRS JUSTICE BACON: Yes.

23 MS TOUBE: Thank you.

24 MR BOMPAS: My Lady, my question or query was in
 25 response to Ms Toube's submission about the FCA having given

190

1 instructions to the company not to share information with
 2 creditors.

3 MS TOUBE: No.

4 MR BOMPAS: That was what I noted had being submitted.

5 MS TOUBE: No. Sorry, just to make it clear, that
 6 comes from the authorities. The cases make it clear that
 7 one should not share different sets of information with
 8 different creditors. Of course, now we have had a hearing,
 9 and there is a hearing bundle, that is not an issue. That
 10 was just my explanation.

11 MR BOMPAS: Well, what I am actually concerned about is
 12 that if we do not get into some difficulty with my learned
 13 friend saying, "Oh, by the way, these authorities prevent
 14 communications about the matters that we want to be talking
 15 about in order to get this thing moving forward one way or
 16 another from"-----

17 MRS JUSTICE BACON: No, there is a hearing. Any of the
 18 creditors could have come along and made submissions at it
 19 and asked for the materials to be provided. Any of the
 20 creditors who are interested can ask Clifford Chance to be
 21 involved in the process of commenting on the voting form and
 22 can make representations to Clifford Chance as regard to the
 23 Scheme documents, including the explanatory statement. I
 24 have asked that a message has got out to all the creditors
 25 that they can ask Clifford Chance for information, insofar

191

1 as they do not have it already. I think that is probably
 2 the best that can be done at this stage, and bearing in mind
 3 there are only two days now before the proposed reconvened
 4 hearing. If anyone else has any specific request to make as
 5 regard to what happens between now and then that is not what
 6 I have just set out, please make that now. Mr Bompas.

7 MR BOMPAS: Now, what I want to be clear about is that
 8 we can communicate freely with the company and its
 9 solicitors about the way forward into the Scheme meeting or
 10 meetings?

11 MRS JUSTICE BACON: Well, that must follow from the
 12 discussions that have been held.

13 MR BOMPAS: Yes, well, I hope so, but I was just a bit
 14 surprised at what was submitted.

15 MRS JUSTICE BACON: All right. All right, thank you
 16 very much, everyone.

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18 (5.01 p.m.)

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25

193

INDEX

26	DISCUSSION re Housekeeping	1
27	SUBMISSIONS by Ms TOUBE	11
28	SUBMISSIONS by Mr SMITH	81
29	SUBMISSIONS by Miss COOKE	88
30	SUBMISSIONS by Mr BOMPAS	97
31	SUBMISSIONS by Mr PYATT	145
32	SUBMISSIONS by Mr DICKENSON	156
33	SUBMISSIONS in reply by Ms TOUBE	167
34	SUBMISSIONS in reply by Mr SMITH	183

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

194

192

190:8,13,14,21,23 191:3,5 192:27,33 toubes (2) 6:15 190:25 towards (4) 14:17 149:24,25 190:4 trace (1) 100:24 trade (1) 161:22 trading (1) 99:21 trail (1) 166:14 transcriber (5) 46:9 15:13,14,15 97:17 translate (1) 136:25 transparency (12) 2:25 88:23 90:3,8,17 91:20 92:3 93:2,9 96:21 145:7 158:16 treated (8) 15:5 62:8 65:15 74:14 86:24 102:20,21 135:1 treating (1) 174:14 treatment (1) 106:22 treats (2) 84:17 175:21 trial (2) 8:5,15 tribunal (11) 24:17,21 25:9 29:2,12 30:1,7 83:5,8 85:23 86:22 tried (2) 36:12 182:1 trigger (3) 64:23 129:6,7 triggered (1) 108:4 troubling (1) 96:4 trouser (2) 60:12 67:24 true (2) 28:17 169:15 trust (12) 14:14,19 15:12 45:16 47:1,1 67:20 79:10,23,25 80:3,9 truth (2) 129:18 142:13 try (7) 35:7 140:4 142:8 156:23 157:1 179:4 183:1 trying (7) 37:17 59:15 69:24,25 77:3 138:13 160:20 ttf (1) 94:3 tuck (1) 163:5 tuesday (1) 1:2 turn (8) 44:14 70:18 76:1,21,22 77:13 121:8 128:9 turned (2) 2:7 70:1 turning (1) 76:3 turnout (1) 92:14 turnover (12) 63:12,17,25 64:5 69:10,17 70:2,4,8,10,13,24 turns (5) 73:17 76:8 107:8 128:10,19 twice (2) 97:1 181:24 tying (1) 160:18 type (8) 57:2 64:25 125:10 128:10,14,20 129:4,9 types (7) 66:9 86:4 113:25 127:17 128:18 137:6 175:18 typically (2) 127:1,3	53:22 67:16 70:16 82:9 101:8 103:8 112:20,23 118:13 126:20 130:6 161:12 164:19 165:7 166:19 169:8 177:20 178:1 185:3,10,17 188:18 understanding (5) 33:16 157:2 160:14 169:12 188:3 understands (2) 35:5 91:25 understood (4) 75:12 137:14 155:4 183:6 undertaken (1) 90:2 undervalued (1) 18:20 underwritten (1) 161:23 undesirable (1) 80:21 undisputed (1) 134:20 undue (1) 164:6 unequally (1) 176:22 unexpected (1) 8:19 unexplained (2) 158:25 162:24 unfair (1) 152:17 unfortunately (6) 4:25 51:6 146:16 147:4 151:4 152:23 unit (1) 87:2 unites (3) 133:17 138:17,19 units (4) 45:11,14,15 87:4 unknown (8) 2:16 50:16,19,23 51:2,5,10 159:21 unknowns (1) 162:23 unless (13) 3:2 74:23 81:10 82:6,11 83:19 87:22 90:8 96:19 127:4 175:10 176:23 183:21 unlike (1) 75:13 unlikely (4) 23:12 29:5 141:3 184:10 unpaid (1) 127:3 unpick (1) 171:13 unquestionably (2) 48:23 49:3 unrecovered (1) 162:6 unsecure (1) 60:17 unsecured (23) 53:16 60:1,4 67:7,11,13 87:9,19 110:4 112:2 114:9,17,19 116:14 127:5 129:24 134:20 135:16 136:10,16 171:2 172:4 173:4 unsurprising (1) 74:12 until (6) 24:14 38:19 77:18 143:25 163:16 177:5 unusual (5) 133:13 134:17 135:18 173:15 174:13 updated (4) 4:11 94:18,21 95:13 updates (1) 190:15 upheld (1) 86:22 upon (7) 55:11,13,17 64:4,14 73:23 183:12 185:19,22 upper (11) 24:16,21 25:9 29:2,12,25 30:7 83:4,8 85:23 86:22 upwards (1) 129:14 urgency (1) 139:21 used (15) 36:7 48:10 54:3,22 61:8 66:24 68:3 95:12,14,17,21 104:7 146:16,18 147:14 useful (5) 19:4 37:13 54:18 154:14 166:14 using (1) 178:16 usual (1) 113:8	valuing (1) 103:11 various (21) 4:5,11 14:18 16:7 19:24 21:9 22:3 36:13 37:16 43:16,18 55:7 63:13 69:15 78:7 90:12 96:1 133:2 163:16 167:18 188:20 vast (1) 80:24 ventilated (1) 94:9 versions (1) 4:11 versus (2) 64:15 168:5 veto (2) 56:18 68:13 vetoed (1) 59:17 via (4) 91:22 149:18 158:12 180:3 video (3) 140:12,14 156:8 viewed (1) 102:10 viewpoint (1) 157:3 views (2) 106:14,20 vindicated (3) 121:14 122:14 130:11 virtual (6) 67:21 75:17,21 76:16 77:13 140:24 virtue (1) 72:21 visual (1) 97:16 visvis (1) 122:12 vote (36) 56:15 59:14,18,20 75:16 81:21 94:16 95:9,11 96:14 147:13,13 149:1,2 152:4,13 153:4 155:18 158:23 159:17 161:5 162:9,10 163:15,21 166:12,13 179:11 180:18,24 181:4,5,10,16,22,24 185:16 voted (1) 151:16 voter (1) 180:25 votes (2) 151:17 181:23 voting (36) 4:17 28:9 37:1,3 39:4,12 41:5 77:20 94:23,25 98:2 101:4 140:17 142:4 144:5 151:3,4,14 153:18 154:12,14,17 162:23 166:17 176:10 177:14 180:8,8,23 181:1,2,21,23 183:10,10 191:21	weak (8) 8:5,10,11,13,16 30:16 144:14 155:10 week (1) 49:21 weif (12) 41:8 46:21,22 79:12,15 98:23 102:14 129:25 145:6 149:3,20 151:25 weim (1) 87:5 wellfunded (1) 123:25 wembley (1) 141:4 went (7) 93:6 147:5 149:25 150:8 151:11 172:17 174:10 weve (6) 146:17,23 149:6 156:1 157:13,17 whatever (12) 5:24 15:12 30:21 32:11 67:6 80:6 148:7,10 149:19 172:2 182:19 183:2 whats (4) 145:11 147:3 152:1 162:18 whatsoever (1) 2:20 whereas (1) 3:18 whoever (4) 2:4 145:17 148:15 164:21 whole (9) 12:7 37:6 72:4,5 115:8 116:10 119:25 137:6 173:3 whom (7) 15:10 27:16 74:8 184:7,8,9 189:5 whos (1) 145:10 whose (5) 52:14 111:12 157:4 158:3,4 whove (1) 149:16 widely (1) 92:11 wider (3) 73:1,6,13 wie (1) 95:22 wife (1) 156:22 willing (1) 156:4 win (4) 16:19 18:22,24 109:25 winding (8) 85:8,11,17,18 86:7,7 113:12,14 wish (8) 3:1,5 9:23 76:1 96:6 156:5 163:5 167:21 witness (6) 12:6,7 42:25 101:20 143:13 188:21 woefully (1) 161:15 won (1) 16:24 wonder (1) 160:19 wondered (2) 80:23 182:3 wondering (1) 64:12 wont (1) 95:16 woodford (4) 145:8 149:21 152:1 156:23 wording (6) 36:8 54:7 92:6 147:14 182:23 183:2 work (13) 8:6 16:1 17:8 18:6 65:19 67:21 82:9 88:19,21 89:16 90:1 102:22 137:7 worked (12) 15:18,21 17:5 19:17 20:19 33:4 35:19 40:7 63:15 82:17 93:5 188:16 working (4) 34:17 37:21 142:2 190:4 workings (1) 21:1 works (4) 21:8 59:7 132:9 184:16 world (1) 131:21 worth (16) 15:19 20:4 21:21 26:16 27:20 31:9 53:3 59:12 88:7 91:7,13 92:24 95:5 98:8 100:22 161:12 worthwhile (2) 102:11 116:23 wouldnt (2) 152:24 188:16 wound (1) 49:8 writer (3) 51:3,19 97:17 written (9) 3:11,13 10:3,9,20 11:2 148:22 153:13,14 wrong (3) 105:23 170:19 185:18 wrongdoing (1) 122:20	x (1) 58:1 Y year (3) 142:15 145:6 160:8 years (11) 30:23 32:12 99:9,10 148:20 150:4,18,20 155:14 156:1 160:16 yesterday (5) 4:15 22:5 37:21,23 42:8 yet (7) 78:15,19 89:12 101:5 131:7 158:4 159:9 youll (2) 147:9,9 youre (5) 137:3 149:4,5 151:24 155:25 yourself (1) 148:17 yourselves (1) 2:20 youve (1) 147:8 Z zacaroli (2) 13:1 132:25 zerosum (1) 171:8 I 1 (4) 13:3 138:25 159:13 192:26 10 (7) 1:2 40:9,12,15 146:6 147:19 153:10 100 (1) 61:7 1000 (1) 148:7 1002 (1) 65:24 1030 (1) 1:3 1037 (1) 8:23 1038 (1) 8:25 104 (3) 40:12,19,20 1067 (1) 101:6 107 (1) 97:9 1092 (1) 32:5 11 (2) 72:13 192:27 11000 (1) 151:1 111 (2) 19:17 28:16 1119 (1) 101:6 1123 (1) 106:6 1125 (1) 106:13 1144 (1) 50:13 1152 (1) 50:15 12 (1) 161:13 125 (1) 186:22 13 (1) 161:13 1316 (1) 62:10 133 (1) 40:5 138 (2) 57:15 132:17 138d (25) 41:15 57:13 61:21 103:2,14 105:9 111:9 118:20 125:18 127:9 128:3,15,23,23,25 129:21 130:1,20 131:8,10,19,24 132:7,11,17 138dtype (1) 125:23 14 (2) 72:9,13 140 (1) 42:11 145 (1) 192:31 146 (1) 101:6 15 (4) 40:4 53:4 89:2,8 156 (1) 192:32 167 (1) 192:33 172 (1) 13:3 178 (1) 44:6 180 (2) 146:17 160:2 1819 (1) 60:6 182 (2) 110:9,18 183 (1) 192:34 184 (1) 54:23 185186 (1) 13:7 186 (2) 124:12,14 1891 (1) 138:25 19 (6) 27:7 40:12,17,18,23 66:15 19000 (1) 151:7 1917 (1) 49:10 193 (1) 192:25 194 (1) 192:49 1a (1) 188:24	2 2 (4) 19:18 52:22 67:20 89:22 20 (2) 34:17 67:19 2000 (1) 148:7 20000 (1) 151:2 2001 (1) 52:22 2002 (1) 13:3 2006 (1) 62:10 2014 (1) 13:16 2016 (1) 49:1 2017 (1) 109:3 2018 (2) 109:3 157:6 2019 (3) 48:22 49:10 81:25 2020 (1) 71:22 2021 (4) 13:2 53:2 65:24 67:20 2023 (3) 1:2 48:21 60:6 2025 (2) 23:13 24:23 21 (5) 23:14 24:5 92:24 110:15,16 212 (1) 97:11 213 (1) 139:1 21st (1) 72:13 220000 (2) 147:20,23 23 (1) 119:15 230 (3) 146:17 160:1,24 24 (1) 41:7 24000 (1) 151:9 25 (3) 14:17 74:5 139:25 250000 (4) 40:13 76:1 147:2 149:7 256 (1) 159:12 26 (3) 25:5 41:11 74:1 27 (2) 41:11,12 28 (6) 41:13 49:11 52:7 157:21 158:11 163:13 2860 (1) 71:22 29 (1) 101:20 291 (1) 41:19 298 (11) 16:20 20:7,20 22:13 23:25 146:12,15,19 159:16 160:24 179:16 3 3 (3) 84:22 98:15 139:25 30 (1) 41:23 300 (3) 41:19 109:7 151:1 30000 (1) 157:14 300000 (1) 147:2 304 (1) 13:2 314 (1) 32:5 32 (1) 73:14 323 (1) 140:8 33 (1) 68:16 334 (1) 140:10 349 (1) 48:22 350000 (1) 157:14 36 (1) 159:11 378 (1) 53:2 3849 (1) 13:16 4 4 (2) 60:7 89:22 40 (1) 43:16 41 (1) 78:22 415 (1) 166:21 418 (1) 49:1 42 (1) 78:10 425 (2) 14:22 166:23 43 (1) 86:1 44 (2) 85:2,19 4412 (1) 46:20 458 (1) 132:24 465 (2) 14:24 32:18 476 (1) 173:21 48 (2) 161:11,15 480 (1) 52:22 4a (1) 188:24 4p (1) 149:4 5 5 (1) 54:18 50 (10) 32:17 47:17 100:25 101:1,9 121:1 146:18 159:25 160:3 161:1 500 (1) 151:3 5000 (1) 157:16 501 (1) 192:18 51 (2) 68:23 69:4 51000 (1) 157:13 523 (1) 67:20 53 (2) 136:14 174:12 5p (1) 149:4 6 6 (3) 71:23 98:16 119:4 60 (4) 14:16 23:3 110:10 147:25 6000 (1) 157:16 61 (2) 19:19,20 63 (1) 49:22 68 (2) 160:25 161:2 6p (1) 149:4 7 7 (3) 20:6,14 159:9 70000 (1) 157:13 705 (1) 48:21 73 (1) 62:11 76 (1) 85:4 77 (3) 19:9,20 66:8 77p (2) 19:7 22:18 79 (3) 53:5 66:8 110:10 8 8 (1) 27:4 80 (1) 42:12 81 (1) 192:28 82 (1) 161:12 83 (2) 70:5,14 85000 (1) 137:5 86 (1) 89:25 87000 (1) 157:9 88 (2) 75:17 192:29 9 9 (3) 40:4,6,15 90 (3) 75:17 115:6 147:22 90000 (1) 147:18 93 (1) 70:22 97 (3) 89:25 147:1 192:30 97000 (1) 157:6 98 (2) 78:2 91:25 99 (1) 71:24 994 (1) 33:12
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